

No. 15459

United States
Court of Appeals
for the Ninth Circuit

JOE GRENIER,

Appellant,

vs.

JAMES W. HARLEY, Special Administrator with
General Powers of the Estate of Dan L. Harley,
deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

MAY - 8 1957

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

FOR APPELLANT:

GEORGE BOSHAE, Esq.,
608 South Hill Street,
Los Angeles 14, California.

FOR APPELLEE:

LYNDOL L. YOUNG,
H. ELLIOT POWNALL, JR.,
Suite 843 General Petroleum Bldg.,
612 South Flower Street,
Los Angeles 17, California.

1. The first part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

2. The second part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

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7. The seventh part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

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9. The ninth part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

10. The tenth part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

United States District Court, Southern District
of California, Central Division

No. 187-15 W.M.

JAMES W. HARLEY, SPECIAL ADMINIS-
TRATOR WITH GENERAL POWERS of
the Estate of DAN L. HARLEY, Deceased,
Plaintiff,

vs.

JOE GRENIER, Defendant.

AMENDED COMPLAINT TO CANCEL DEED
AND FOR OTHER RELIEF

Comes now, the plaintiff, and for cause of action
against the defendant alleges as follows, to-wit:

I.

Plaintiff is a citizen and resident of the County
of Los Angeles and of the State of California, and
is the duly appointed, qualified and acting Special
Administrator with General Powers of the Estate
of Dan L. Harley, deceased, and was so duly ap-
pointed by the Probate Department of the Supe-
rior Court of the State of California, in and for
the County of Los Angeles, by Letters of Special
Administration with General Powers of said estate
duly issued to him thereby on August 29, 1955. That
at all times herein mentioned Dan L. Harley, de-
ceased, was a citizen and resident of the County of
Los Angeles and of the State of California; that
at all times herein mentioned the defendant Joe

Grenier was and is a citizen and resident of the County of Powell and of the State of Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Dan L. Harley died on July 30, 1955, at the age of 77 years; that for a period of approximately three months prior to the death of said decedent he was critically ill, bed-ridden and suffered from heart failure, chronic chest difficulties which required the continuous use of oxygen, general physical and mental debility, exhaustion and fatigue; that during all of said period said defendant Joe Grenier was constantly in attendance at the home of the said decedent in the City of Glendale, California, and acted as the agent and attorney-in-fact for the said decedent, and bore a confidential relationship to said decedent. Plaintiff is informed and believes, and upon such information and belief, alleges that on or about July 12, 1955, the said defendant Joe Grenier, without consideration and by fraudulently and surreptitiously taking advantage of the weakened mental and physical condition of said decedent, procured the signature of said decedent to a Deed under the terms whereof the said decedent conveyed to said defendant Joe Grenier the following described real property situated in the City of Deer Lodge, County of Powell, State of Montana; to-wit: 210 Milwaukee Avenue, 500 Main Street and 502 Main Street. The plaintiff does not have the legal description of said property but when

the same is obtained leave to amend the complaint to show said legal description thereof will be requested. The fair market value of said real property is the sum of \$35,000.00.

III.

That unless restrained by this Honorable Court from so doing the defendant will transfer, convey, assign and encumber said real property hereinabove described to other parties pending the trial of this action.

Wherefore plaintiff prays judgment as follows:

That said Deed conveying the real property described herein be cancelled; that the defendant be required to execute a good and sufficient Deed conveying said property to the plaintiff; that defendant be restrained and enjoined from selling, conveying or encumbering said real property pending the trial of this action; that in the event said real property described herein has been conveyed to third parties by the defendant prior to the bringing of this action that plaintiff have judgment against said defendant for the sum of \$35,000.00, the value of said real property, together with interest on said amount; for plaintiff's costs herein and such other and further relief as is just and equitable.

LYNDOL L. YOUNG and

H. ELLIOT POWNALL, JR.,

/s/ By LYNDOL L. YOUNG,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 13, 1955.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant, Joe Grenier, and for himself alone in answer to the amended complaint on file herein admits, denies and alleges as follows:

I.

Answering Paragraph II of the said complaint said defendant generally and specifically denies each and every allegation therein contained except that said defendant admits that the decedent prior to his death conveyed to said defendant, Joe Grenier, the real property described in plaintiff's amended complaint as an unconditional executed gift and that said decedent intended the same as such.

For a first further separate defense defendant alleges:

I.

That at the time the decedent conveyed to the defendant, Joe Grenier, the real property mentioned in said amended complaint the conveyance was intended to be made to said defendant as an unconditional gift to be owned by said defendant as his absolute, sole and separate property and that said gift was fully executed.

For a second further and distinct affirmative defense defendant alleges:

I.

Defendant refers to his allegations contained in Paragraph I of his first further and affirmative defense and by reference incorporates the same herein as though set forth in full.

II.

That by reason of the conduct of the plaintiff aforesaid said plaintiff has been guilty of laches and unreasonable delay in bringing this action.

Wherefore defendant prays that the claim of the plaintiff be denied and that defendant recover his costs of suit herein incurred and for such other and further relief as this court shall deem just and proper.

Dated this 22nd day of December, 1955.

/s/ GEORGE BOSHAЕ,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 27, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S EXHIBIT No. 2
PRE-TRIAL STIPULATION

Pursuant to the Order of the Court the attorneys for the respective parties in the above entitled action stipulate as follows:

(a) Statement of Admitted Facts:

1. That Dan L. Harley died on July 30, 1955. Prior to his death he was a citizen and resident of the County of Los Angeles, State of California.

2. That James W. Harley is the duly appointed, qualified and acting Special Administrator With General Powers of the Estate of Dan L. Harley, Deceased. That James W. Harley at all times men-

tioned in the Amended Complaint was and now is a citizen and resident of the County of Los Angeles, State of California. That James W. Harley is the nephew and only heir of said decedent, Dan L. Harley.

3. That at all times mentioned in the Amended Complaint the defendant Joseph Grenier was and now is a citizen and resident of the County of Powell, State of Montana.

4. That on May 16, 1955, the decedent, Dan L. Harley, owned the real property involved in this action which is located at Deer Lodge, Montana. That the legal description of said real property is as follows:

The north sixteen and a half (N 16 $\frac{1}{2}$) feet of Lot Nineteen (19) and all of Lot Twenty (20) in Block Twenty-four (24) of the original townsite of the City of Deer Lodge, County of Powell, State of Montana, according to the official plat and survey thereof now on file and of record in the office of the County Clerk and Recorder in and for the County of Powell, State of Montana, to which plat and survey reference is hereby made for a more particular description thereof.

That on May 16, 1955, the decedent Dan L. Harley signed a deed which conveyed said real property to the defendant, Joe Greiner. That the defendant, Joe Grenier, did not pay any money consideration to the decedent, Dan L. Harley, for the conveyance of said real property. That Eva Lee Bretschneider, a Notary Public, notarized the signature of said

decedent, Dan L. Harley, on said deed. That said Notary was taken by the defendant, Joe Grenier, to the home of said decedent for the purpose of notarizing said deed.

5. That the defendant, Joe Grenier, purchased the said above described deed from a stationery store in Glendale and procured the services of a Public Stenographer located in Glendale to fill out the typed portions thereof.

(b) Statement of Unadmitted Facts—Not to Be Contested: 1. None.

(c) Statement of Unadmitted Facts—To Be Litigated: Plaintiff's statement.

1. That on May 16, 1955, the decedent, Dan L. Harley, was mentally and physically sick and in a critical condition. That he was practically blind and was confined either to his bed or a wheelchair.

2. That the defendant, Joe Grenier, took advantage of the weakened physical and mental condition of said decedent and induced said decedent to sign a deed conveying the real property hereinabove described to defendant. That on the date said deed was signed, to-wit, May 16, 1955, the defendant stood in a fiduciary relationship to said decedent.

3. That defendant represented to said decedent that by placing the title to the real property hereinabove described in defendant's name the said decedent would be protected in not having said real property involved in certain litigation pending in the Superior Court in the County of Los Angeles,

State of California, between said decedent and the sister of the deceased wife of said decedent.

4. That defendant concealed from Joseph H. Edgar, who the defendant personally knew was the attorney for said decedent, that said decedent had signed a deed conveying said real property hereinabove described to defendant until on or about July 16, 1955, at which time upon being questioned by the said Joseph H. Edgar the defendant stated in substance as follows:

That the bank accounts of Dan L. Harley were in joint tenancy with the defendant and that he, the defendant, had been paying all the bills of Dan L. Harley and that he had checks and records to support all payments. That the said Edgar then asked said defendant what was going to happen to the joint tenancy accounts when Dan L. Harley died, as they ordinarily would go to the defendant as the surviving tenant, and the said Edgar thereupon asked said defendant if it was his intention to retain the balance in the said bank accounts as his own property when the said Dan L. Harley died; that the said defendant thereupon stated that just as soon as an executor was appointed for the estate of Dan L. Harley, he, the defendant, would turn over all the balances in the joint bank accounts to said executor, and further stated "I will just have to be trusted on this." That the said Edgar then stated to said Grenier substantially as follows: "I understand that the Montana property has been deeded to you," and said defendant replied, "That is right." The said Edgar then stated,

“What is back of the deeding of the Montana property to you? Does Dan Harley figure he can get around the Tessie Harley Will contest by deeding it to you?” And the said defendant replied, “That is right.”

5. That the defendant likewise concealed from James W. Harley, the nephew and only heir of the decedent Dan L. Harley, that the real property hereinabove described was deeded to said defendant by said decedent.

(c) Defendant's Statement: 1. That the real property hereinabove described was conveyed to the defendant, Joe Grenier, by the decedent, Dan L. Harley, as an unconditionally executed gift and that said decedent intended the same as such.

(d) Schedule of Exhibits: 1. The deed, or a photostatic copy thereof, hereinabove mentioned. The signature of Dan L. Harley on said deed is admitted by the plaintiff.

(e) Statement of Objections Reserved: All objections are reserved by the parties to the admissibility in evidence of any admitted fact.

H. ELLIOT POWNALL, JR. and
LYNDOL L. YOUNG,

/s/ By LYNDOL L. YOUNG,

Attorneys for Plaintiff and Cross-
Defendant.

/s/ GEORGE BOSHAЕ,

Attorney for Defendant and Cross-
Complainant.

Acknowledgment of Service attached.

[Endorsed]: Filed April 18, 1956.

[Title of District Court and Cause.]

MEMORANDUM OF LAW

Point I.

The defendant stood in a confidential relationship to Dan L. Harley, deceased, and in law was deemed a trustee in all of his dealings with said decedent.

Sections 2219, 2228, 2229, 2231, 2234 and 2235, Civil Code of California.

Point II.

The defendant induced the decedent, Dan L. Hurley, to convey the real property involved in this action to defendant through fraud and undue influence.

Sections 1572 and 1573, Civil Code of California.

Sime v. Malouf, 95 CA 2d 82;

Bank of America v. Sanchez, 3 CA 2d 238;

Estate of Arbuckle, 98 CA 2d 562;

Hayter v. Fulmor, 92 CA 2d 392;

Hickson v. Gray, 91 CA 2d 684;

Levy v. Industrial Finance Corporation, 16 Fed 2d 770;

Anderson v. Thatcher, 76 CA 2d 50.

Respectfully submitted,

H. ELLIOT POWNALL, JR., and

LYNDOL L. YOUNG,

/s/ By LYNDOL L. YOUNG,

Attorneys for Plaintiff and Cross-
Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed April 18, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S PRE-TRIAL OPENING
STATEMENT

1. On May 16, 1955, Dan L. Harley was both mentally and physically ill and was practically blind. He was confined either to his bed or his wheelchair; he suffered from heart disease and respiratory involvement and was required to take oxygen both night and day. He suffered a stroke on March 22, 1955, and died on July 30, 1955.

(a) The foregoing facts will be established by evidence through the testimony of witnesses, including the following:

Joseph H. Edgar, James W. Harley, and perhaps others, including the defendant, and Garnett Studebaker, who was the nurse for Dan L. Harley during the period from March 22 to July 30, 1955.

2. The defendant on May 16th, 1955, held the Power of Attorney of Dan L. Harley and signed checks on the bank accounts of Dan L. Harley, which for convenience only stood in the joint names of Dan L. Harley and the defendant.

(a) The foregoing facts will be established through the sworn admissions of the defendant.

3. That on May 16, 1955, the defendant purchased a printed form deed from a stationery store in Glendale; that he took said deed to a Public Stenographer in Glendale and instructed the said Public Stenographer what to type into said deed; that defendant also transported Mrs. Eva Lee Bret-

schneider, a Notary Public, from the Glendale branch of the Bank of America, where she was employed, to the home of Dan L. Harley for the purpose of notarizing the signature of Dan L. Harley.

(a) The foregoing evidence will be established through the sworn admissions of the defendant, the deposition or testimony of said Notary Public and the introduction in evidence of the said deed.

4. That said defendant, prior to May 16, 1955, represented to Dan L. Harley that he should place the title to the real property involved in this action in the name of the defendant solely for the purpose of protecting the said Dan L. Harley from having said real property involved in certain litigation that was pending in Los Angeles County between the said Dan L. Harley and a sister of the deceased wife of Dan L. Harley.

(a) The foregoing evidence will be established through the testimony of Joseph H. Edgar, who was the attorney for Dan L. Harley during the period March 22 to July 30, 1955, and was also the executor named in the Will of Dan L. Harley dated April 7, 1955.

5. That the defendant did not pay any consideration at all to Dan L. Harley for the deed to the property involved in this action.

(a) The foregoing facts will be established by the sworn admissions of the defendant.

In addition to the facts hereinabove set forth the

plaintiff will develop his case against the defendant at the trial through the cross examination of the defendant under F.R.C.P. 43 (b), and by impeachment evidence.

Dated: April 18th, 1955.

H. ELLIOT POWNALL, JR., and
LYNDOL L. YOUNG,
/s/ By LYNDOL L. YOUNG,
Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed April 18, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for non-jury trial on October 31, 1956, before Honorable William C. Mathes, Judge of the above entitled Court. Plaintiff was represented by his attorneys, Lyndol L. Young, Esq., and H. Elliot Pownall, Jr., Esq. Defendant was represented by his attorney, George Boshae, Esq. Evidence both oral and documentary was presented to the Court by the plaintiff and defendant. The trial of said action was concluded on November 1, 1956. Having considered the evidence presented and heard argument by plaintiff and defendant, the Court now makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

The Court finds the facts to be as follows:

1. Plaintiff at all times involved in this proceeding was and is the Special Administrator with General Powers of the Estate of Dan L. Harley, deceased, No. 368110 in the Superior Court of the State of California in and for the County of Los Angeles. At the commencement of this action plaintiff was a citizen of the State of California, and defendant was a citizen of the State of Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2. That Dan L. Harley died on July 30, 1955, at the age of 77 years. That for a period of several months prior to the death of said decedent he was critically ill, bed-ridden, suffered from heart failure, chronic chest difficulties, arteriosclerosis, general physical debility, exhaustion and fatigue. That defendant for a period of several months prior to the death of said decedent acted as a business agent and attorney in fact for said decedent, and in such capacity attended to the financial and business affairs of said decedent. That said defendant on May 16, 1955, bore a confidential relationship toward said decedent and said decedent on said date, to-wit, May 16, 1955, and for a long time prior thereto and thereafter until he died, reposed trust and confidence in defendant; and during all of that time defendant had knowledge of and accepted the trust and confidence of the decedent, and acted thereon. That on May 16, 1955, defendant caused a grant

deed to be prepared under his supervision and directions by a public stenographer; that said grant deed conveyed from the decedent to the defendant the real property described in paragraph I of the Amendment to Plaintiff's Amended Complaint herein.

That no consideration passed from defendant to decedent for the execution of said deed by the decedent. That defendant obtained the execution of said deed by the decedent through undue influence and constructive fraud practiced by defendant on the decedent.

That decedent was not incompetent at the time said deed was executed by decedent, to-wit, May 16, 1955.

3. That it was not the intention of the decedent in executing and delivering said deed to the defendant to make a gift of the real property described in said deed to defendant. That it was the intention of the decedent in executing and delivering said deed to the defendant to vest the title to the real property described in said deed in the defendant only as trustee for the decedent.

4. That defendant has collected the rents from the real property described in said deed since June 1, 1955, in the respective sums of \$235.00 per month for each month subsequent to June 1, 1955, to and including November 1, 1956, amounting to a total sum of \$4,230.00.

5. That defendant has expended for necessary repairs and maintenance of said real property de-

scribed in said deed and for insurance and taxes since June 1, 1955, the sum of \$1,498.93.

6. That the defendant holds the title to the real property described in said deed and described in paragraph I of Plaintiff's Amendment to Plaintiff's Amended Complaint as trustee for the Estate of Dan L. Harley, deceased.

7. That the allegations contained in paragraphs I and II of the Cross-complaint of the defendant are untrue; that the denials and allegations contained in paragraphs I and II of Plaintiff's Answer to the Cross-complaint of defendant are true.

Conclusions of Law

The Court Concludes:

1. In all respects as set forth in the foregoing Findings of Fact.

2. The Court has jurisdiction of the parties and of the subject matter of the cause of action set forth in Plaintiff's Amended Complaint, as amended.

3. Said findings having been made upon issues which are determinative of the cause, any further findings or findings upon issues other than those embraced in the foregoing findings would be immaterial, and are not made for that reason.

4. That plaintiff is entitled to judgment against defendant in the sum of \$4,230.00 representing the total rents collected by the defendant from the real property described in paragraph I of Plaintiff's Amendment to Plaintiff's Amended Complaint since

June 1, 1955, to and including November 1, 1956. That defendant is entitled to a credit on said amount of \$4,230.00 in the sum of \$1,498.93 representing expenditures made by defendant for the necessary repairs and maintenance on said real property and insurance and taxes paid by the defendant, leaving a balance due from defendant to plaintiff in the sum of \$2,731.07, together with interest in the amount of \$200.00, thereby making a total sum of \$2,931.07, which sum of money the defendant holds as trustee for the plaintiff.

5. That plaintiff is entitled to judgment against the defendant which orders and decrees that defendant holds the title described in said deed executed by the decedent on May 16, 1955, as trustee for the Estate of Dan L. Harley, deceased.

6. That plaintiff is entitled to judgment against defendant directing and ordering the defendant to execute the grant deed which has been lodged with the Clerk of the Court and which conveys said real property described in paragraph I of plaintiff's Amendment to Plaintiff's Amended Complaint to the Estate of Dan L. Harley, deceased; and further ordering and directing that defendant execute and acknowledge the execution of said grant deed before the Clerk of the Court within 10 days after notice to the defendant's attorney of the signing of the judgment herein by the Court.

7. The Clerk of the Court shall deliver said grant deed after the same has been executed and acknowledged by the defendant to the attorneys for

the plaintiff, as and when the judgment in favor of plaintiff herein shall become final.

8. That plaintiff is entitled to judgment against the defendant restraining and enjoining defendant from encumbering, transferring or signing the title to said real property described in paragraph I of Plaintiff's Amendment to Plaintiff's Amended Complaint pending the time that defendant executes the grant deed lodged with the Clerk of the Court and until the further order of the Court.

9. That plaintiff is entitled to judgment that defendant shall take nothing from plaintiff by reason of defendant's Cross-complaint on file herein.

10. Plaintiff is entitled to have and recover his costs of suit herein.

Let judgment be entered accordingly.

Done in Open Court this 19th day of November, 1956.

/s/ WM. C. MATHES,
Judge.

Acknowledgment of Service attached.

[Endorsed]: Lodged November 8, 1956. Filed November 19, 1956.

United States District Court, Southern District
of California, Central Division

No. 187-15 W.M.

JAMES W. HARLEY, SPECIAL ADMINIS-
TRATOR WITH GENERAL POWERS of
the Estate of DAN L. HARLEY, Deceased,
Plaintiff,

vs.

JOE GRENIER,

Defendant.

JUDGMENT

The above entitled action came on regularly for non-jury trial on October 31, 1956, before Honorable William C. Mathes, Judge of the above entitled court. Plaintiff was represented by his attorneys, Lyndol L. Young, Esq., and H. Elliot Pownall, Jr., Esq., and defendant was represented by his attorney, George Boshae, Esq. Evidence both oral and documentary was presented to the Court by the plaintiff and defendant. Having considered the evidence presented and having heard argument by plaintiff and defendant, and the Court having made its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, Adjudged and Decreed as Follows:

1. That defendant holds the title to the real property hereinafter described as trustee for the Estate of Dan L. Harley, deceased, to-wit:

The north sixteen and a half (N 16½) feet of Lot Nineteen (19) and all of Lot Twenty (20)

in Block Twenty-four (24) of the original townsite of the City of Deer Lodge, County of Powell, State of Montana, according to the official plat and survey thereof now on file and of record in the office of the County Clerk and Recorder in and for the County of Powell, State of Montana, to which plat and survey reference is hereby made for a more particular description thereof.

2. Defendant is hereby ordered and directed to execute and acknowledge the grant deed lodged with the Clerk of the Court (copy of which is hereto attached as Exhibit A and incorporated by reference herein), which grant deed conveys the above described real property to the Estate of Dan L. Harley, deceased, within 10 days from the receipt of notice by the attorney for the defendant of the signing of the Judgment herein by the Court. The Clerk shall deliver the grant deed so executed and acknowledged by the defendant to the attorneys for the plaintiff as and when the Judgment in favor of plaintiff herein shall become final.

3. Defendant is hereby restrained and enjoined from encumbering the above described real property and from transferring or assigning the title to the said above described real property to any person or party other than the Estate of Dan L. Harley, Deceased, pending the time that defendant executes and acknowledges the deed conveying the above described real property to the Estate of Dan L. Harley, deceased, and until the further order of the Court.

4. That plaintiff do have and recover judgment against the defendant in the sum of \$2,931.07.

5. Defendant shall take nothing from plaintiff by reason of defendant's Cross-complaint on file herein.

6. That plaintiff do have and recover his costs of suit herein taxed in the amount of \$.....

Let Judgment be entered accordingly.

Done in Open Court this 19th day of November, 1956.

/s/ WM. C. MATHES,
Judge.

EXHIBIT "A"

GRANT DEED

This Indenture, made the day of November, 1956, between J. H. Grenier, also known as Joe Grenier, the party of the first part and Estate of Dan L. Harley, Deceased, the party of the second part.

Witnesseth: That the said party of the first part pursuant to the Order and Judgment of Honorable William C. Mathes, Judge of the United States District Court, Southern District of California, Central Division, duly signed and entered on November, 1956, does by these presents, Grant unto said party of the second part and to its assigns forever, all that certain, piece or parcel of land, situate, lying and being in the County of Powell, and State of Montana and bounded and particularly described as follows, to-wit:

The north sixteen and a half (N 16½) feet of

Lot Nineteen (19) and all of Lot Twenty (20) in Block Twenty-four (24) of the original townsite of the City of Deer Lodge, County of Powell, State of Montana, according to the official plat and survey thereof now on file and of record in the office of the County Clerk and Recorder in and for the County of Powell, State of Montana, to which plat and survey reference is hereby made for a more particular description thereof.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To Have and to Hold, all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to its assigns forever.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

.....

State of California

County of Los Angeles—ss.

On, 1956, before me, the undersigned, a Notary Public in and for said County and State, personally appeared.....
, known to me to be the person whose name is subscribed to the within

instrument and acknowledged that he executed the same.

Witness my hand and official seal.

[Seal]

Notary Public in and for said County and State.

Acknowledgment of Service attached.

[Endorsed]: Lodged November 8, 1956. Filed November 19, 1956. Docketed and Entered November 20, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Joe Grenier, defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 20, 1956.

/s/ GEORGE BOSHAЕ,

Attorney for Appellant Joe Grenier.

[Endorsed]: Filed December 4, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause:

A. The foregoing pages numbered 1 to 42, inclusive, containing the original

Amended Complaint;

Answer to Amended Complaint;

Cross-Complaint;

Answer to Cross-Complaint;

Pre-Trial Opening Statement by Defendant and Cross-Complainant;

Memorandum of Law by Defendant;

Findings of Fact and Conclusions of Law;

Judgment;

Notice of Appeal;

Designation of Record on Appeal;

Appellee's Designation of Additional Portions of the Record;

Affidavit and Order Thereon Extending Time to Docket Record on Appeal;

and a full, true and correct copy of the Minutes of the Court on October 31, 1956; November 1, 1956;

B. Plaintiff's exhibits 1 through 16, inclusive, and defendant's exhibits A through I, inclusive.

C. One volume of Reporter's Official Transcript of Proceedings had on October 31, 1956.

I further certify that my fee for preparing the foregoing record amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of the said District Court this 21st day of February, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk,

/s/ By CHARLES E. JONES,
Deputy.

In the United States District Court, Southern
District of California, Central Division

No. 18715-WM Civil

JAMES W. HARLEY, Special Administrator with
general powers of the Estate of Dan L. Harley,
deceased,

Plaintiff and Cross-Defendant,

vs.

JOE GRENIER,

Defendant and Cross-Complainant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Wednesday, October 31, 1956. 9:30 A.M.

Honorable William C. Mathes, Judge Presiding

Appearances: For the Plaintiff and Cross-
Defendant: H. Elliot Pownall, Jr., Esq., and
Lyndol L. Young, Esq., 843 General Petroleum
Building, 612 South Flower Street, Los Angeles
17, California.

For the Defendant and Cross - Complainant:
George Boshae, Esq., 608 South Hill Street, Los
Angeles 14, California. [1]*

The Court: Are there any ex parte matters?

The Clerk: No, your Honor.

The Court: Please call the calendar.

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

The Clerk: Case 18715, James W. Harley, and so forth, v. Joe Grenier.

Mr. Young: Ready for the plaintiff, your Honor.

Mr. Boshae: Ready for the defendant.

The Court: You may proceed, gentlemen. I have been over the file.

Mr. Young: Very well, your Honor.

The Court: I take it the first exhibit would be the pretrial stipulation?

Mr. Young: Yes, your Honor.

The Court: Unless you have some other order?

Mr. Young: No. We have a deed which, I believe, is the only other exhibit.

The Court: Has that been marked?

The Clerk: Yes, your Honor, a warranty deed has been marked as Plaintiff's Exhibit 1.

Mr. Boshae: I have the original, your Honor, and we will stipulate that is a duplicate, and if your Honor wishes to see the original, we have it, and then we will just leave the photostat in. [3]

The Court: Yes, you might hand it to the clerk, and I will examine it, and the clerk will deliver it, if there is no objection.

Mr. Young: No objection, your Honor.

The Court: It is stipulated that the photostatic copy is a genuine copy in all respects of what it purports to be?

Mr. Boshae: Yes, your Honor.

Mr. Young: So stipulated, your Honor.

The Court: And that it is a deed which was delivered by the grantor therein named to the grantee therein named on or about the 16th day of May, 1955?

Mr. Young: So stipulated, your Honor.

Mr. Boshae: So stipulated.

The Court: It is received in evidence as Plaintiff's Exhibit 1, and the pretrial stipulation will be Exhibit 2, if there is no objection.

Mr. Young: No objection, your Honor.

Mr. Boshae: No objection.

The Court: Received in evidence.

(The documents referred to were marked Plaintiff's Exhibits 1 and 2 and were received in evidence.)

The Court: You may proceed.

Mr. Young: Mr. Grenier.

Mr. Boshae: I will go out in the hall to see if he is there, your Honor. [4]

The Court: You may.

Mr. Boshae: I don't see him.

Mr. Young: Will he be here?

Mr. Boshae: Yes, I expect him here. Yes, I do.

Mr. Young: Mr. Edgar.

JOSEPH H. EDGAR

called as a witness on behalf of the plaintiff and cross-defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Joseph H. Edgar.

The Clerk: Be seated, please, Mr. Edgar.

Direct Examination

Q. (By Mr. Young): Mr. Edgar, will you state your profession, please?

A. I am an attorney at law, admitted to practice in the State of California.

(Testimony of Joseph H. Edgar.)

Q. When were you admitted? A. 1936.

Q. Have you practiced continuously since that time?

A. I have, sir, except for the four years in the Army during World War II.

Q. When were you in the Army?

A. From 1942 to 1946. [5]

Q. And in what branch of the Service?

A. Judge Advocate General's department.

Q. Did you hold a commission?

A. Yes, sir.

Q. What was your commission?

Mr. Boshae: We will stipulate, your Honor, that the witness is a licensed attorney, licensed to practice in the State of California. On the other items, I don't think they are material, and I will make an objection on that ground.

The Court: Sustained.

Q. (By Mr. Young): Mr. Edgar, did you know Mr. Dan L. Harley during his lifetime?

A. Yes, sir.

Q. When did you meet him the first time?

A. In February of 1954.

Q. And what was the occasion of that meeting?

A. I received a letter from Attorney Edward Roberts in Youngstown, Ohio, and I knew Mr. Roberts in the Service. He wrote and told me that he was handling the estate of Fanny Harley in Ohio, that there was property here that was owned by Fanny, that Daniel L. Harley was her brother, and that he wanted me to get in touch with Mr. Harley,

(Testimony of Joseph H. Edgar.)

and that he had written Mr. Harley that I would get in touch with him, so I called Mr. Harley.

Q. Where was Mr. Harley living at that time?

A. 1330 Blossom Street, Glendale.

Q. Now, when did Mr. Harley die?

A. July 30th, 1955.

Q. Very well. From the time you made the acquaintance of Mr. Harley down to the time he passed away, did you have occasion to see him during that period? A. I did, sir.

Q. How frequently?

A. I would say about every two weeks.

Q. When was the last time you saw Mr. Harley?

A. July 16, 1955.

Q. And where did you see him on that occasion?

A. At his home.

Q. The same home where you met him?

A. Yes, sir.

Q. Now, directing your attention to the date March 22, 1955, state whether or not you had a meeting with Mr. Harley on that date, or approximately that date?

A. Is that the date a will was signed, may I ask?

Q. Yes.

A. Well, I saw him on that date, and also a few days before.

Q. Let's take the occasion of the few days before. When would that be, approximately?

A. Well, I would say two or three days probably. [7]

Q. Who was present at that meeting?

(Testimony of Joseph H. Edgar.)

A. Mr. Harley, Mr. Grenier, — that is Daniel Harley and Mr. James Harley.

Q. Yes. Daniel is the decedent?

A. Yes, sir.

Q. And Mr. James Harley is his nephew, and the plaintiff in this action? A. Yes, sir.

Q. And did a conversation take place at that time?

A. Yes, sir, there was a conversation.

Q. Will you state the conversation, please?

A. There was a conversation with reference to Mr. Daniel Harley making a will. The various provisions that were to go in the will were discussed, and among them—well, as to who the beneficiaries would be under the will.

He told me what he wanted to put in the will. We discussed various points. One of them was with reference to what he was going to do with respect to Mr. Joe Grenier.

Q. Was Mr. Grenier present during this conversation you are now relating? A. Yes, he was.

Q. Very well. Go ahead with the conversation.

A. Well, I don't remember without having the will the exact way he wanted his property left at this time, because there were other wills, but there was conversation as to what [8] he wanted to do with respect to Mr. Grenier.

Q. Yes. That is what we are interested in.

A. All right. Mr. Harley said that he would like to do something for Mr. Grenier, and leave him something. He said he had always been a good

(Testimony of Joseph H. Edgar.)

friend of his, and he wanted to remember him, and he said he would like to leave him one-half of the Montana property.

James Harley was there at the time, and when Dan made the remark that he wanted to leave Mr. Grenier one-half of the Montana property, Mr. Grenier said, "I don't want anything." He said, "I have plenty of money. I don't need it. I don't want to receive the property."

I think I made the statement, "Well, Joe, Mr. Harley has always told me what a good friend you were of his, and he wants to leave you something."

And I turned to Jim Harley, and I said,—oh, he said he wanted to leave the other half to Jim Harley of the Montana property, and I turned to Jim, and I said, "You live down here. Mr. Grenier lives in Montana," and I said, "It is rental property. It would be good to have somebody on the ground who lives there, and can look after the interests of the property, to see that it is repaired, the taxes are paid, the rents collected, and that the property is kept rented."

And Mr. Harley agreed, — Jim Harley agreed with that statement. [9]

Mr. Boshae: To which I object as calling for a conclusion.

The Witness: Mr. Harley said, "That's right."

And that was the substance of that conversation.

The Court: When did that conversation occur, Mr. Edgar?

The Witness: That, your Honor, was just shortly

(Testimony of Joseph H. Edgar.)

before this will was drafted and signed. I believe the date was March 22, 1955.

Q. (By Mr. Young): Subsequent to this conversation, was a will prepared? A. Yes, sir.

Q. And was that provision inserted in the will?

A. Yes, sir.

Mr. Young: We have that will here, your Honor. The original has been filed in the County Clerk's Office, and we have subpoenaed the file.

Counsel, do you make any point on the——

Mr. Boshae: No. I would like to have it offered by reference, in any event, your Honor, or if you have a copy——

The Court: It is a record of another court. Do you have a copy?

Mr. Boshae: I have a copy here, your Honor, which I prepared myself, if counsel wants to look at it.

Mr. Young: I have a copy of it, I believe, and unless you make a point of it,—— [10]

Mr. Boshae: I am not making a point as to its being a copy.

The Court: I suggest you agree upon a copy, and offer the copy in evidence.

Mr. Boshae: May I see your copy, Mr. Young, and if it is the same as this, we will stipulate.

The Court: If you agree upon that, can you agree that the will was in effect——

Mr. Young: There were two other wills.

The Court: ——when Dan Harley died?

Mr. Boshae: It was in existence, your Honor.

(Testimony of Joseph H. Edgar.)

Now, the effect of it I don't know. I think the effect of it is now being contested, or will be, in the state courts.

The Court: Can you agree that it has not been revoked?

Mr. Boshae: It has not, that I know of.

The Court: It has not been revoked in whole or in part?

Mr. Boshae: We will stipulate, your Honor, that this is a photostatic copy of the original.

The Court: Then may it be stipulated, in addition to this being a true copy, the document now handed to the clerk being a true copy of the will referred to by the witness, that this will had not been revoked in whole or in part at the time of the death of Dan L. Harley?

Mr. Young: Your Honor, it had been revoked by two subsequent wills. [11]

Mr. Boshae: Well,—

The Court: Then that is not the fact, that I suggested.

Mr. Boshae: One of the wills, your Honor, has apparently not been admitted to probate, which was executed subsequent to that. In other words, there was a March will, an April will, and a July will.

The Court: Very well. I just misapprehended the facts.

Then pursuant to the stipulation, this will that is now offered will be received in evidence as Plaintiff's Exhibit—

Mr. Young: 3, isn't it, counsel?

(Testimony of Joseph H. Edgar.)

The Court: —3, Mr. Clerk?

The Clerk: Yes, your Honor.

(The document referred to was marked Plaintiff's Exhibit 3, and was received in evidence.)

The Court: You had better let the clerk have it, Mr. Young. He hasn't marked it yet.

Mr. Young: All right, your Honor.

The Clerk: Shall I place it before the witness?

Mr. Young: Yes, please.

Q. (By Mr. Young): Mr. Edgar, is Plaintiff's Exhibit No. 3 a photostatic copy of the will of March 22, 1955, that has been referred to?

A. Yes, sir.

Q. Will you refer to the provision in that will with reference to the Deer Lodge, Montana property? [12]

The Court: Isn't it apparent?

Mr. Young: It is, your Honor, yes.

The Court: It speaks for itself, doesn't it?

Mr. Young: That is right, your Honor.

Q. Subsequent to the execution of the will, Plaintiff's Exhibit No. 3,—

Mr. Boshae: Is that 3, your Honor, or is it 2?

The Court: 3. The stipulation of facts is Exhibit 2.

Mr. Boshae: I see.

Q. (By Mr. Young): —did you prepare another will for Mr. Harley, Dan L. Harley, or was one prepared under your supervision?

A. I would say that I did not actually draft the

(Testimony of Joseph H. Edgar.)

will. The will was drafted by an attorney, Louis Thompson. I was——

Mr. Boshae: To which I object as calling for a conclusion, your Honor, unless there is a proper foundation laid.

Mr. Young: Very well.

Q. Did you talk to Mr. Dan L. Harley after the will of March 22nd, Plaintiff's Exhibit 3, was executed, about another will, a new will?

A. Yes, sir.

Q. What conversation did you have with him, and solely with reference to the Deer Lodge property and Mr. Grenier?

A. The conversation about the Deer Lodge property, and what he wanted—how he wanted to dispose of the Deer Lodge property? [13]

Q. Yes.

A. He stated that he wanted to dispose of it one-half to Joe Grenier, and one-half to James Harley.

Q. That was the same provision that was contained in the March 22nd will? A. Yes, sir.

Q. All right. Now, during the time that you have indicated that you were seeing Mr. Harley, were you his attorney? A. Yes, sir.

Q. Did he confer with you about his legal matters? A. He did.

Mr. Boshae: Just a moment. Your Honor, I am going to object to the compound question. The first question that was propounded calls for a conclusion.

(Testimony of Joseph H. Edgar.)

The Court: Overruled.

The Witness: I considered myself to be his attorney and——

Mr. Boshae: To which I object as calling for a conclusion.

The Witness: ——and an adviser.

Mr. Boshae: Just a moment. I make a motion to strike, your Honor.

The Court: Motion denied. He is stating his understanding. [14] He may state his understanding of what the relationship was. Of course, it is a conclusion, but he may state it.

Mr. Boshae: I submit, your Honor, that the conversations are the basis on which an understanding may be had.

The Court: You may cross examine on it, if you wish, Mr. Boshae, if there is any issue about it.

Mr. Young: It is preliminary.

The Court: If a man draws a will for another man,——

Mr. Boshae: I don't think there is any evidence, your Honor.

The Court: ——he may say he is the man's attorney, at least at that time.

Mr. Boshae: I don't think he drew a will, your Honor.

The Court: He says he did, as I understand it. Didn't you draw Exhibit 3?

The Witness: I did not draft it, sir. I got the terms from Mr. Harley, and another attorney in

(Testimony of Joseph H. Edgar.)

the same office that I am in actually, in conference with me, set up the formality of the will.

The Court: Did the other attorney do it under your direction?

The Witness: Yes, sir. He and I worked together on it.

The Court: Proceed.

Q. (By Mr. Young): Subsequent to April 7th, did Mr. Harley ever at any time request you to draw a deed conveying [15] the Montana property to Mr. Grenier? A. No, sir.

Q. When did you for the first time discover, if you did, that such a deed had been signed by Mr. Harley?

A. On or about June 18, 1955.

Q. And state the circumstances with reference to your discovery of that fact?

A. In the afternoon on that date, or about that date, I was at Mr. Harley's home at 1330 Blossom Street, and Mr. James Harley was there, and at that time Mr. Daniel Harley told both of us that he had deeded the property to Joe Grenier.

In the same conversation he told us that he had given his 1950 Chevrolet Bel-Air to a practical nurse he had, Mrs. Studebaker, and he also told us he had given Mrs. Studebaker the television set that he had.

Q. Subsequent to the conversation that you had with Mr. Grenier about the Deer Lodge property, around March 20, 1955, did you have occasion to see him again? A. Mr. Grenier?

(Testimony of Joseph H. Edgar.)

Q. Yes.

A. I never had a conversation at that time with Mr. Grenier. It was with Mr. Harley.

Q. Mr. Grenier was present, as I understood you.

A. No, no. Mr. James Harley and I were present [16] at the June conversation.

Q. No, I am talking about the March 20th conversation. A. Oh, I beg your pardon.

Mr. Boshae: May I get it straight: Was that June 16th?

The Witness: I said on or about June 18th, counsel.

I am sorry, I missed the question.

Q. (By Mr. Young): That is all right. Do you understand the question?

A. No, sir, I do not.

Q. You related a conversation that you had with Mr. Dan L. Harley on or around the 20th of March, or the 22nd of March, 1955, when Mr. Grenier was present. A. Yes, sir.

Q. When there was a discussion about the Deer Lodge property. A. Yes, sir.

Q. Do you recall that testimony?

A. Yes, sir.

Q. Now, after that date, did you have occasion to see Mr. Grenier again?

A. I saw him again—I couldn't say whether I saw him between that conversation and July 16, 1955, or not, but I saw him on July 16, 1955.

(Testimony of Joseph H. Edgar.)

Q. All right. Now, where did you see Mr. Grenier on July 16, 1955? [17]

A. At 1330 Blossom Street.

Q. And who all was there? Who else was present?

A. Mr. Daniel Harley was there, Mr. Grenier was there, and I was there.

Q. Did you have a conversation at that time with Mr. Grenier—— A. I did.

Q. ——with reference to the Deer Lodge, Montana property? A. I did, sir.

Q. All right. State that conversation.

The Court: Was it in the presence of Dan L. Harley?

Mr. Young: Yes, Dan L. Harley. I understood he was there.

The Court: Is that correct?

The Witness: Yes, sir. Do you want the whole conversation that took place that day?

Q. (By Mr. Young): Yes, state the conversation.

A. Well, Mr. Grenier said that he understood—he told me, he said, “I understand that Jimmy Harley has been out to see Dan, and that he has talked to Dan about having a guardian appointed for him.”

He said, “Dan doesn’t need a guardian.” He said he has—he said, “If he does have one, it isn’t going to be Jimmy Harley.” He said, “I am perfectly capable of taking care [18] of Dan’s affairs.” He said, “I have a power of attorney from Dan.” He

(Testimony of Joseph H. Edgar.)

said, "I am paying the bills." He said, "I have—the accounts are in joint tenancy." He said, "I am taking care of all of the bills."

Q. What accounts did he refer to?

A. The bank accounts.

Q. Very well.

A. I said to him—I don't know whether this was in sequence, but, anyhow, Dan was lying on the couch, and had been confined either to the couch or bed for some time, and so I said to him, "What is going to happen to those bank accounts when Dan dies? They are in joint tenancy, and," I said, "under the law they will go to you."

He said, "Just as soon as an executor is appointed for Dan's estate," he said, "I am going to turn those accounts over to him."

The Court: Who said that?

The Witness: Mr. Joe Grenier.

So to go back to the conversation, when the discussion about Jim Harley being appointed his guardian took place, he said, "Jim Harley has always"—he says, "is hardly more than a stranger to Dan, and he isn't going to be his guardian." He said, "Isn't that right, Dan?"

And Dan said, answered the question, "Yes."

Then I said to Mr. Grenier, I said, "I understand that [19] Dan has also deeded the Montana property to you."

He said, "That's right."

I said, "What is back of that? Does he intend

(Testimony of Joseph H. Edgar.)
to avoid the Tessie Harley will contest by doing that?"

He said, "That is right."

Q. (By Mr. Young): That is what Mr. Grenier said?
A. Yes, sir.

The Court: Did all this occur in the presence of Dan Harley?

The Witness: It did, your Honor.

The Court: Within his hearing?

The Witness: Yes, your Honor.

The Court: How old a man was he at that time?

The Witness: I am not sure of his exact age, but I would say around 77 or 78.

The Court: What was his apparent physical condition, as it appeared to you at that time?

The Witness: It appeared very poor, your Honor.

The Court: What did he appear to be suffering from?

The Witness: Well, for one thing, he had a very large hernia, which he showed to me on occasion, because he most often was in his pajamas and bathrobe when I would see him. He didn't show it to me exactly. He showed it to me through his pajamas, and would complain of pain.

Also, his ankles were very swollen. I would say [20] almost from the time that I knew him or met him in February of 1954, he was extremely thin. It was—actually, I think it would be an honest description to say that it was almost like a skeleton, with the skin over it. He in his youth had had an injury to his hand while working—

(Testimony of Joseph H. Edgar.)

Mr. Boshae: Just a moment. Your Honor, I am going to object to what he had in his youth.

The Witness: I will take that back, your Honor. His hand was deformed from some sort of injury. I think two fingers were missing, but he could hold a cigarette in that hand, however.

The Court: Which hand was that?

The Witness: I wouldn't want to say, your Honor. As it comes back to me, I am quite sure it was his left hand, because he could write, and did write right-handed, as I remember it.

He often said to me that he didn't expect to live much longer. This was after his wife had passed away in March, around March 20th, or March—yes, March 20th, of 1955, and toward the end he used a wheelchair, I know, that is, he was pushed in a wheelchair by the practical nurse.

On occasion he did complain that he couldn't see too well. He also complained of shortness of breath, and also told me that he had to have pillows under him when he slept because of shortness of breath, and I know that he, toward [21] the end, would always lie with pillows under his back.

The Court: Did he appear to hear all right?

The Witness: I would say that he heard all right, your Honor.

The Court: Your next question.

Q. (By Mr. Young): With reference to the period, say, two months prior to the time he passed away, did you ever make any observation with reference to the use of oxygen by him?

(Testimony of Joseph H. Edgar.)

A. I never saw him use the oxygen, Mr. Young.

Q. Very well. Now, when did you see Mr. Harley the last time, Dan L. Harley?

A. July 16, 1955.

Q. Did you make any observation at that time with reference to his mental alertness?

A. Yes, sir, I observed his mental condition.

Q. Well, let's go back to March 20th, when his wife died, and down to the last time you saw him, did you notice any change in his mental condition?

Mr. Boshae: Just a moment. Your Honor, I think that question is speculative, and I don't think it calls for a proper observation, as to whether there was any change. I object.

The Court: Yes, it involves two appraisals, one at the beginning and the other at the end of the period, and the [22] deduction as to what occurred in between.

Mr. Young: Very well, your Honor.

The Court: Why don't you go at it in sequence?

Mr. Young: Yes, I will.

Q. On March 20, 1955, what observation, if any, did you make with reference to the mental condition of Mr. Dan L. Harley?

A. I would say that it was satisfactory, all right. I mean I saw no——

The Court: You mean as to whether or not it was sound or unsound?

Mr. Young: Yes, sound or unsound.

The Witness: I would say it was sound.

Q. (By Mr. Young): All right. Now, subse-

(Testimony of Joseph H. Edgar.)

quent to March 20, 1955, state whether or not you observed any change in his mental condition over what you described it to be.

Mr. Boshae: To which I object, your Honor, on the ground it is speculative, and calls for a conclusion.

The Court: Sustained. I suggest you develop as to other observations he may have made at a later time.

Mr. Young: Very well.

Q. On the 18th of June, when you saw Mr. Harley and discussed with him, or he stated to you he deeded the Montana property to Mr. Grenier, did you make any observation at that time with reference to his mental condition, as to its soundness or unsoundness? [23]

A. I would say that—I don't know whether it was what he told me——

Mr. Boshae: Just a moment. Your Honor, I don't think that is responsive up to this time.

The Witness: Yes, sir, I did.

Q. (By Mr. Young): All right. State what you observed.

A. I don't know whether I was influenced by what he told me he had done, or whether it was a true observation, but I——

Mr. Boshae: Just a moment. Your Honor, I make a motion to strike that part of his answer as not responsive and calling for a conclusion.

The Court: Is it still in the California Code that the person who is not the questioner can object

(Testimony of Joseph H. Edgar.)

upon the ground that the answer is not responsive?

Mr. Boshae: I did not get the comment, your Honor.

The Court: In this court I never permit a person other than the interrogator to object that an answer is not responsive. You might object that it is incompetent, irrelevant and immaterial, or hearsay, or some other ground. But, of course, this is a diversity case, so I like to try a diversity case as much as possible like it would be tried in the Superior Court, where this case belongs,—

Mr. Boshae. That is correct, your Honor. [24]

The Court: —so if the Superior Court would rule that the objection of non-responsiveness is available to anyone but the questioner, I will so rule.

Mr. Boshae: Your Honor, it has been my understanding that they have so ruled, at least,—

The Court: Several years ago, what I call the logical rule used to be in force, but then some legislator-attorney was apparently disappointed because he could not object because of the ground of non-responsiveness, so he put a bill through the Legislature to make it the ground of an objection. If what the witness says is competent evidence, what difference does it make whether the questioner asked him the right question to elicit it or not?

Mr. Boshae: Then I will make the objection on the ground it is incompetent, irrelevant and immaterial. If your Honor would prefer to read back that part of it, I think it is obvious that it is.

The Court: What part are you referring to now?

(Testimony of Joseph H. Edgar.)

Mr. Boshae: May I ask the court reporter to read it back, please?

The Court: Yes, please.

(The answer referred to was read as follows:

“A. I don’t know whether I was influenced by what he told me he had done, or whether it was a true observation, but I——”) [25]

The Court: Up to that point the answer may be stricken, if you so move.

Mr. Boshae: Thank you, your Honor.

Q. (By Mr. Young): Now, Mr. Edgar, with the question in mind, I believe you may now state what your observation was.

A. My observation on June 18, 1955, was that I did not feel that he was as mentally alert as he had been in the past.

Mr. Young: Now, Mr. Edgar, you have related a conversation while Mr. Grenier was there. I will withdraw that question.

Cross examine.

Cross Examination

Q. (By Mr. Boshae): Now, Mr. Edgar, I think you stated on direct examination that you were the attorney for Mr. Harley, is that your understanding?

A. Well, yes, I was his adviser on legal affairs. I originally was the administrator of his sister’s estate.

Q. That had nothing to do directly with him, did it?

A. No. He had requested me, because of his

(Testimony of Joseph H. Edgar.)

wife's health, and also because he said he was not well, to relieve him of the responsibility of being the executor, which he [26] was named in Fanny Harley's will, and so I was the administrator of the estate, and in conjunction with meeting with him in that capacity, and reporting to him what was being done, he also came to discuss legal matters of his own with me.

He referred to me as his attorney when we would talk about his problems.

Q. Now, isn't it true, Mr. Edgar, that you—in the original acquaintance with Mr. Harley, that you were referred to him by an attorney in Ohio, and he did not come to you first; isn't that correct?

A. That is right.

Q. And you went to his home and told him that you had been referred to him by an attorney in Ohio, with reference to the handling of an estate here of his deceased sister; isn't that correct?

A. No, sir. I first called him by telephone, and told him that Mr. Roberts had written to me to get in touch with him, and his remark to that was, he said, "I am certainly glad to hear from you." He said, "I have been wanting to hear from you, and been expecting to hear from you."

Q. Now, you knew that there were guardianship proceedings that were initiated and tried and concluded in April of 1955, did you not?

A. Yes, sir. [27]

Q. Did you handle that for Mr. Harley?

A. I was not the attorney of record, but I

(Testimony of Joseph H. Edgar.)

worked with the attorneys of record in connection with the case.

Q. You did not appear as attorney of record in court in his behalf either, did you?

A. No, sir. I was present in court, but I was not the attorney of record.

Q. And is it not true, Mr. Edgar, that at that time he was declared competent?

A. That is right.

Q. Now, at any time after you were told that the deed was given to Mr. Grenier by Dan Harley, did you ever take any legal proceedings at any time to cancel that deed during his lifetime?

A. No, sir.

Q. As a matter of fact, Mr. Grenier told you that he had recorded the deed, didn't he?

A. No, sir. May I qualify that: If he did, I have forgotten that he told me.

Q. You don't recall whether he did or not?

A. No, I couldn't say, and I might say—you asked me if I took any legal proceedings to cancel the deed. I did not personally, but I took Mr. Jim Harley to Mr. Lyndol Young's office, and introduced him to Mr. Lyndol Young.

Mr. Boshae: Just a moment. I am going to make a motion [28] to strike the latter part of that answer as irrelevant, incompetent and immaterial.

Mr. Young: Your Honor, he opened the subject matter himself.

The Court: And as not responsive?

Mr. Boshae: Yes, your Honor.

(Testimony of Joseph H. Edgar.)

The Court: The objection is good as to you.

Mr. Boshae: Yes, sir.

The Court: Sustained upon the latter ground.

Mr. Boshae: And, also, upon the ground it calls for hearsay.

The Court: Put your next question, or do you wish a further answer to this pending question?

Q. (By Mr. Boshae): Now, Mr. Edgar, did you ever discuss any of Mr. Harley's financial affairs with him? A. Yes, sir.

Q. Did you know that he was handling his finances in collaboration with Mr. Grenier?

Mr. Young: I object to that as calling for a conclusion of the witness, what his finances were.

The Court: It assumes a fact not in evidence, doesn't it?

Mr. Boshae: I think it has been asked and answered, your Honor. If I might say, I think the objection came a little bit too late. [29]

The Court: Sustained.

Q. (By Mr. Boshae): Did you know that he was handling his financial affairs, or that he was writing checks and handling the bank account in collaboration with Mr. Grenier? A. Yes, sir.

Q. And you knew, as a matter of fact, that he was writing checks as late as July, didn't you?

Mr. Young: Who?

Mr. Boshae: Mr. Harley.

The Witness: I don't believe I knew that. I don't think I ever saw him write any checks in July.

(Testimony of Joseph H. Edgar.)

Q. (By Mr. Boshae): Do you know whether or not, of your own knowledge, that he wrote any checks in July of 1955?

A. Not directly. I do by hearsay.

Mr. Boshae: I have no further questions, your Honor.

The Court: Any redirect?

Mr. Young: May I ask another question, your Honor?

The Court: You may.

Redirect Examination

Q. (By Mr. Young): Mr. Edgar, you referred on your direct examination to a conversation that you had with Mr. Grenier in July about the property in Montana, the deed to the property?

A. Yes, sir. [30]

Q. What, if anything, during that conversation did he say with reference to consulting an attorney about drawing that deed?

A. When he told me that, or answered the question, "What is back of Dan deeding you the Montana property, does he hope to avoid the Tessie Harley will contest by doing it?" and he replied, "Yes," I then said, "You know there are a lot of legal problems to be considered in making a deed of that type, such as gift tax."

In answer to that, he said, "Don't you worry. I have legal advice concerning that." He said, "Do you know Carl Sturzenacker?"

I said I had heard his name.

(Testimony of Joseph H. Edgar.)

He then went on to say, "I am on the Board of the National Retail Liquor Dealers Association," and as I understood, at least it is my recollection he said that Mr. Sturzenacker was their attorney.

Q. Does that cover the conversation?

A. That is as near as I can remember it.

Mr. Young: That is all.

Mr. Boshae: I have no further questions.

The Court: You may step down, Mr. Edgar.

(Witness excused.)

The Court: Your next witness.

Mr. Young: Mr. Grenier. [31]

Your Honor, I took this matter up with counsel, and he said Mr. Grenier would be here. I told him I wanted to put him on the stand.

Mr. Boshae: I expect him here.

Mr. Young: Oh, you do?

Mr. Boshae: But, obviously, he is not in the courtroom.

Mr. Young: I told counsel I wanted to put him on the stand as my first witness, and he said it would not be necessary to subpoena him, he would be here.

Mr. Boshae: He will be here, counsel. I expected him here at 9:30, your Honor.

The Court: Call another witness.

Mr. Young: Dr. Steelman.

Your Honor, may Mr. Edgar be excused?

Mr. Boshae: So far as I am concerned, yes.

The Court: He may be excused.

DR. STUART P. STEELMAN

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Dr. Stuart P. Steelman, O.D.

The Clerk: S-t-u-a-r-t, is it?

The Witness: Yes.

The Clerk: Be seated, please. [32]

Direct Examination

Q. (By Mr. Young): State your profession, Doctor, please. A. Optometrist.

Q. Where did you go to school?

A. I went to U.S.C., and I was graduated in 1939.

Q. When were you admitted to practice your profession in California?

A. About two months later. After I passed my California State Board examination, I got notice that I passed.

Q. And have you practiced your profession since that time up to the present time?

A. Yes, with the exception of between 1943, November 2nd, to May 19, 1946. I was in the Army for that time, for two years and nine months.

Q. Where did you maintain your offices?

A. With my father, at 123 South Brand Boulevard.

Q. Did you know Dan L. Harley during his lifetime?

A. Yes, I knew him very well.

(Testimony of Dr. Stuart P. Steelman.)

Q. When did you meet him the first time?

A. The first time I met Mr. Harley was about October of 1949, when he first came in to have his glasses adjusted by me.

Q. Subsequent to that day, did you have occasion to see him again? [33]

A. You mean afterwards?

Q. Yes, afterwards.

A. Yes, I saw him many times after that time. About three months after that I examined his eyes and sold him a pair of reading glasses. That was about the first part of 1950.

Mr. Boshae: Doctor, will you kindly speak a little louder?

The Witness: Yes, I will be glad to.

Mr. Boshae: Thank you.

The Witness: All right. Then I got acquainted with his wife shortly after that, as a result of selling him his reading glasses in the first part of 1950. Anyway, I sold him another pair of glasses, of reading glasses in 1953, around about August, 1953.

Q. (By Mr. Young): When you first met Mr. Harley, did you make any observation as to his physical condition?

A. Yes, I did. I made the notation myself that he was very spry, very alert, because he and my dad used to kid each other about being so alert at their respective ages, being in their seventies.

Q. When was the last time you saw Mr. Harley alive?

(Testimony of Dr. Stuart P. Steelman.)

A. The last time I saw Mr. Harley alive was approximately June 8, 1955, when one of my girls said that Mr. Grenier had made an appointment for Mr. Harley to be examined [34] for his eyes, to have his eyes checked over.

And at the time that the appointment came around, why, the front door opened, and my father and I and one blonde girl in the office named Fay Thompson saw Mr. Grenier wheel Mr. Harley in in a wheelchair, come in through the front door in a wheel chair.

As he brought him into the refracting room, Mr. Grenier and I helped Mr. Harley off the chair into the refracting chair. At that time I noticed he was in very bad physical shape. He reminded me of some of these pictures of these war prisoners out in Japan, where the——

Mr. Boshae: Just a moment. I am going to object to that as immaterial, irrelevant and incompetent, your Honor, and no proper foundation for these statements.

The Court: What it reminded you of is not material.

The Witness: I am sorry about that.

The Court: But, Doctor, however he appeared to you from your observation or your examination, you may state.

The Witness: That was the first experience in human life I ever saw a person in that bad a shape, so I remember it very vividly. Anyway, Mr. Grenier and I helped him into the chair. Each of us got

(Testimony of Dr. Stuart P. Steelman.)

an arm, and helped him into the chair, and it was a dead weight of approximately 85 pounds, I would judge.

Q. (By Mr. Young): Did you make an examination of him? [35] A. Yes, I did.

Q. What did you do?

A. It wasn't a complete examination, because the man was in such poor condition, I couldn't. I couldn't do a complete examination on him as I had always done in the past.

I took an examination of his vision, which was spasmodic. He couldn't interpret what I was trying to ask him. I had to hold his head many times to look at the letters on the wall, and I was getting pretty discouraged, because he couldn't seem to concentrate on what I was trying to have him do, in looking at the letters on the wall, before I proceeded to examine his eyes for the reading glasses.

Q. Did you reach an opinion with reference to the condition of his vision at that time, say, to read, —to read the newspaper?

A. Yes, on my little instrument that I have, it has a large—it has a card with different size letters. He couldn't read the standard size letters, even with his prescription in place, so I had him read the bigger ones, and even then he couldn't seem to understand what I was talking about. Now, whether he couldn't read it, or whether he couldn't comprehend what I was trying to ask him, I don't know, but I got the impression that he couldn't read hardly at all; even with the correction in

(Testimony of Dr. Stuart P. Steelman.)

place, the very best correction in place, that I had for him for reading. [36]

Q. At the conclusion of your examination, was he taken out of the chair and put back in the wheelchair?

A. Yes, Mr. Grenier and I helped him off the chair, and back into this collapsible, or whatever it was, it was a regular lightweight wheelchair. And to start with, Mr. Harley recognized me when I saw him the last time, but I was very discouraged, because he had always been so alert and so up on his toes.

Mr. Boshae: Just a moment. Your Honor, I am going to object to that portion of the answer as irrelevant, incompetent and immaterial.

The Court: Will you rise, please, when you address the court, and state it so I can hear you?

Mr. Boshae: I am sorry I make a motion to strike the answer, and object on the grounds it is irrelevant, incompetent and immaterial, as to how this man felt, that is, that he was discouraged, or whatever it was that he said.

The Court: The objection is sustained.

Mr. Boshae: Thank you.

The Court: It is immaterial how you felt about it, Doctor.

The Witness: Yes, I realize that; just as a friend.

The Court: Except as he appeared to you, that is it. Anything you perceived with your senses with respect to his condition, you may state. [37]

(Testimony of Dr. Stuart P. Steelman.)

The Witness: I see.

Q. (By Mr. Young): Go ahead. You may state.

A. I was going to say that I am trying to recall,—I don't remember whether Mr. Harley told me he had a stroke, or whether Mr. Grenier said he had a stroke just recently, but, anyway, it came to my attention that he had just had a heavy stroke, within three or four weeks before the time he was wheeled in, and the impression I got at the time why was the man brought in in such poor shape, was something trying to be proved.

Mr. Boshae: Again, your Honor, I make the objection and move to strike the answer.

The Court: That portion of it beginning with the impression may be stricken.

Be specific, Mr. Boshae. If you make a motion to strike the answer and a part of it is good, I will deny the motion.

Mr. Boshae: That portion of the answer commencing with the word "impression," your Honor.

The Court: Motion granted.

Q. (By Mr. Young): Doctor, on the occasion of June 8th, when Mr. Harley was in your office, did you form an opinion as to any change that you observed with reference to his mind, the alertness,—

A. Well, he wasn't the same.

Q. —from the time you first met him? [38]

Mr. Boshae: I am going to object, your Honor, on the ground it is irrelevant, incompetent and immaterial, and the answer is speculative, and there has been no proper foundation.

(Testimony of Dr. Stuart P. Steelman.)

The Court: I suggest that you take it by stages, Mr. Young.

Mr. Young: Very well.

Q. When was the first time you met Mr. Harley?

A. It was around about November of 1949.

Q. What was his condition and appearance at that time?

A. At that time he was in marvelous health, and by his walk you would say the man was in fine health, that he had a keen mind, and everything about him was very sharp and alert, and I admired the man because of that point. I had on the card——

The Court: I think you have answered the question. You say he was 72 at that time?

The Witness: I would say he was about 72 or 73. I had on the card, when I first wrote his age down on the card, which was about two or three months after that, about the first part of 1950.

Q. (By Mr. Young): All right. On June 8th, when you made the examination, when Mr. Grenier was there, did you make any observation as to any change with reference to his mind or his alertness?

A. Yes, I did.

Mr. Boshae: Just a moment. Your Honor, I am going to object.

The Court: Leave out the change, and we will get along. Don't ask him about the change. Just ask him how he appeared to him.

Mr. Young: All right, your Honor.

Q. What did you observe?

(Testimony of Dr. Stuart P. Steelman.)

A. I observed there was a definite change in the man.

Mr. Boshae: To which I am going to make a motion to strike the answer, your Honor, as irrelevant, incompetent and immaterial.

The Court: The question is: What did you observe as to whether or not he was alert, or otherwise?

The Witness: I observed——

The Court: Is that what your question is?

Mr. Young: Yes, your Honor.

The Witness: My observation was the man was of a very white, chalky face feature. He was run down physically, I mean, that I noticed. His eyes had a glassy stare. He reminded me, typically, of a year and half before that, of my uncle who had three strokes and looked the same way.

So I said to myself, "Here is another typical"——

Mr. Boshae: Just a moment, your Honor.

The Court: Not what you said to yourself. [40]

The Witness: All right. Then I won't say.

Mr. Young: What you observed.

The Witness: Anyway, the symptoms looked very similar to what I had seen beforehand of a typical heavy-stroke case.

Mr. Young: Cross examine.

Cross Examination

Q. (By Mr. Boshae): Dr. Steelman,——

A. Yes, sir.

(Testimony of Dr. Stuart P. Steelman.)

Q. —is it your testimony that you saw Mr. Harley wheeled into your office?

A. Is it my testimony alone, or somebody else's, too?

Q. No, yours. Is that your testimony,——

A. Yes.

Q. —that you actually saw him wheeled into your office?

A. Yes, that's right, definitely.

Q. Do you recall my seeing you on or about the first part of October, at your office?

A. Yes, I remember, yes.

Q. And do you recall my question to you, whether or not when you first saw Mr. Harley,—when you first saw him when he came in the last time? A. Yes, I do. [41]

Q. And do you recall your telling me that you did not see him come in, that you were in your back office working?

A. No, I did not say that.

Q. You did not say that? A. No, no.

Q. And don't you also recall—— A. No.

Q. —that you don't recall his first coming in, and the first time you saw him was when he was in a wheelchair in your office, sitting in the reception room?

A. No, that wasn't the right words, no.

Q. You say that is not correct?

A. I turned the light on in my hallway to see who was coming in, because I wanted to greet him. So I saw him coming through the front door, but

(Testimony of Dr. Stuart P. Steelman.)

I was still standing back at the entrance to my test room, which was about—oh, I would judge about 50 or 60 feet away, but I saw Mr. Grenier wheeling him in through the front door at that distance.

Q. Now, is it your testimony that Mr. Harley couldn't see, at the time that you examined him?

A. When I got through with my examination, I was of the opinion that he was seeing very poorly.

Q. It isn't your testimony that he could not see at all; is that correct?

A. I would not say couldn't see at all; not as a blind man, no. [42]

The Court: You say "very poorly." What do you mean? Could he read a newspaper?

The Witness: I gave him, your Honor, a chart to read for close up, and the letters start very large from the top and graduate down to smaller sizes at the bottom.

I had him start to try to read the small print at the bottom, as he had always done before with his correction in place, and he couldn't make out, and then I had him start reading at the top, and he couldn't read very much, and which is mighty large for a prescription reading, and he stumbled very much in reading from the top to start with.

The Court: From your observation of him at that time, do you have an opinion as to whether or not he would have been able to read the newspaper, as an individual normally reads a newspaper?

(Testimony of Dr. Stuart P. Steelman.)

The Witness: I would not say so efficiently, your Honor, no.

The Court: Could he read it at all?

The Witness: No. He mumbled incoherently.

The Court: I am talking about his vision now.

The Witness: Yes. I mean when I asked him——

The Court: He doesn't see with his mouth. I am talking about his vision.

The Witness: As a rule, I have to ask a man if he can read. I asked him to read, but he wouldn't even start reading. [43] He mumbled something incoherently, and wasn't reading, but he heard me distinctly, because his hearing was still all right.

The Court: I am talking about his ability to read. Did he have the ability to read the morning paper, like you read the morning paper that morning?

The Witness: I wouldn't say so, no, sir.

The Court: Or any part of it?

The Witness: No, sir.

Q. (By Mr. Boshae): Would your answer be the same if he was with or without glasses, Doctor?

A. Well, I would say from what it was, as I recall, when I started having him read there——

The Court: Oh, I intended to ask you, and my question presupposed, if I didn't say so, that he had his glasses on, of course.

The Witness: Oh, yes, yes.

The Court: Did you also so understand my question?

The Witness: Roughly, I did, your Honor. But

(Testimony of Dr. Stuart P. Steelman.)

I would say in there, of course, I endeavored to try to have him read the large letters without glasses in place, or the correction in place, and I never do that, but I suppose he couldn't see quite as good then, but even with the correction in place, even with the large letters, he wasn't even cognizant then to know what to read then. [44]

So when I got all through, I told Mr. Grenier, and I said, "Well, the man's glasses I sold him two years and a half ago are still okay, the best obtainable," and I said, "There is nothing else to improve them."

As I recall, I said that I could not improve them, "That they are still as good as anything that could be done."

So I would say that the man was not reading efficiently, so as to see with the correction in place, where he had always done it before very efficiently.

Q. (By Mr. Boshae): Would you say, in your opinion, that he could not read subsequent to that time, or he would not be able to read subsequent thereto?

A. Well, I would say the last time I saw Mr. Harley, when he came to me to adjust his glasses prior to his wife passing away, he would say, "Doc, let me look at some fine print. I want to see if with my glasses I can still read good." And I gave him my chart, my little handbook, and he read it down to the small print. That, as I recall, was about three or four months before his wife passed away. He told me she was dangerously sick. So at

(Testimony of Dr. Stuart P. Steelman.)

that time I remember very distinctly he could read the small print.

Q. I am talking about after the last examination, Doctor, in your opinion. A. Yes, sir.

Q. Would you say he would be able to read with glasses? [45]

A. I would say he would not, no.

Q. Do you have your card with you?

A. Do I have my card?

Q. Yes, your record that you keep.

A. I don't have my exact card of Mr. Harley, no, because it was destroyed by my girls unknowingly.

I had the word "Deceased" on both his card, and Mrs. Harley's card, and I had it as Mr. Dan L. Harley and Mrs. Dan L. Harley. So what happened, I am sorry, I tried to find the card, and we had the two cards right side by side there, and the girl, without knowing, thought she had thrown out Mrs. Harley's card, and she had thrown out Mr. Harley's card, and all I have is just Mrs. Harley, Mrs. Dan L. Harley.

Q. Then you have been refreshing your memory from this card, have you not, Doctor?

A. I had in the past, because every time Mr. Harley would come in, I would always look to the card, because we talked about his eyes quite a bit. So for that reason I knew his eyes better than any other patient I ever had.

Q. I am talking about your testimony here in

(Testimony of Dr. Stuart P. Steelman.)

court. You have been refreshing your memory from your card; is that not correct?

A. That's right.

Q. When did you last see the card?

A. The last time I saw the card was when Mr. [46] Jim Harley came in to tell me about his uncle—is it his uncle?

Q. That is right.

A. He mentioned about his uncle had passed away, which I think was about—I don't remember, I think it was around seven or eight months—pardon me—seven or eight weeks after I saw Mr. Harley for the very last time.

Q. And did he tell you that there was going to be some litigation coming up regarding Mr. Harley's estate?

A. He didn't go into detail too much, but he said there was something, so I told him I will keep this card here for any future knowledge. So at that time I checked about the visual acuity, and I brought out the card, and I told him what it was, and I refreshed my memory from the card at that time. As I say, that was the last time that I saw the card, to my own cognizance, at the time that Mr. Harley told me about his uncle passing away.

Q. And you destroyed the card after that?

A. I didn't knowingly destroy the card. I had it in my card file. In fact, I had the big word "Deceased" on it, "Hold for reference." And on his wife's card I had "Deceased, hold for refer-

(Testimony of Dr. Stuart P. Steelman.)

ence," and I had the two of them together, so they would be right together.

Q. And you say the last time you saw the card was three or four weeks after Mr. Harley passed away; is that correct? [47]

A. That's right, yes, sir.

Q. And Mr. Harley passed away on or about the 30th of July, 1955, so you saw the card about the middle of August; is that correct?

A. I would say approximately so, yes, sir.

Q. And you refreshed your memory from information that you saw on that card in the middle of August, 1955; is that correct? A. That's right.

Mr. Boshae: I have no further questions.

The Court: Any redirect?

Mr. Young: None, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: The next witness.

Mr. Young: Mr. Grenier I observe is here, your Honor.

May Dr. Steelman be excused, your Honor?

Mr. Boshae: So far as I am concerned, he may.

The Court: He is excused.

J. H. GRENIER

the defendant herein, called as a witness under the provisions of Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows: [48]

The Clerk: Will you state your name, please?

The Witness: J. H. Grenier.

The Clerk: Be seated, please.

Direct Examination

Q. (By Mr. Young): Mr. Grenier, what is your business or occupation?

A. Well, right now I am retired, and have been for about five years.

Q. What was your business when you were active?

A. Well, I was in the tavern business and the oil business.

Q. Where do you reside?

A. Deer Lodge, Montana.

Q. Are you a citizen of the State of Montana?

A. I am.

Q. Did you know Dan L. Harley during his lifetime? A. Yes, for about 50 years.

Q. Where did you meet Mr. Harley?

A. In Butte, Montana.

Q. Were you and he ever associated in business together? A. We were.

Mr. Boshae: If the court please, may I ask Mr. Young whether he is calling him——

Mr. Young: Pardon me, your Honor. I call [49] Mr. Grenier, the defendant in this action, under

(Testimony of J. H. Grenier.)

Rule 43(b) of the Federal Rules of Civil Procedure.

Mr. Boshae: Your Honor,—well, that is all right. We withdraw the objection at this time.

Q. (By Mr. Young): Did you have occasion to see Mr. Harley at his home in Glendale on or about March 20, 1955? A. On March 20th?

Q. On or around March 20th?

A. Yes, right after, the 21st.

Q. And what was the purpose of your seeing him on that occasion?

A. Mr. Harley called me up and told me that his wife died, and I flew down here.

Q. You flew down from your home in Montana?

A. Yes, sir.

Q. And did you go to Mr. Harley's home?

A. No, I went to the Biltmore Hotel that night, and went to Mr. Harley's home the next day. He asked me to come down.

Q. Then did you remain in his home for a while? A. No, I didn't.

Q. You went back to the Biltmore Hotel?

A. Yes, sir.

Q. On that occasion were you present at a conversation with Mr. Edgar, and Mr. Harley, Jim Harley, and yourself? [50]

A. You mean in that period?

Q. Yes. A. No.

Q. Were you ever present when a conversation took place, around March 20 or 22, 1955, between Mr. Dan L. Harley, Mr. Joseph H. Edgar, and

(Testimony of J. H. Grenier.)

Jim Harley, about drawing a will for Mr. Harley?

A. No, I was not.

Q. You were not there?

A. I was there, but I never heard any conversation, or see or heard of a will. I was—I knew there was a will in existence, but I didn't see it. I was in the other room when that said will that you are bringing up now was being signed. That's all I know about the will.

Q. Were you present at a conversation between Mr. Joseph H. Edgar, Mr. Dan L. Harley, and Mr. Jim Harley, when Mr. Dan L. Harley said to Mr. Edgar, "I want to leave my friend, Joe Grenier, some property in my will"?

A. Well, I can't say that I did. I wasn't there. No, I didn't hear that kind of a conversation. As I say, I know nothing about the will that you have reference to. I didn't see it signed. I was in another room. I didn't hear it read, nor didn't know anything about it.

Q. On the occasion that the conversation I referred to in the previous question took place, did [51] Mr. Dan L. Harley state, "I want to leave Joe Grenier a one-half interest in the Deer Lodge property"?

A. I never heard that statement made, no.

Q. On the occasion I have referred to, did you state, "Dan, I don't want you to leave me anything. I have all the money I need, and I don't want any of your property"?

A. No, I didn't make a statement like that. In

(Testimony of J. H. Grenier.)

fact, I would be foolish if I ever did make a statement of that kind.

Q. You did not make that statement?

A. No, I did not make that statement.

Q. Did you at any time know that a will had been signed by Mr. Harley, in which he left you a one-half interest in the Deer Lodge property?

A. I did after the will was signed, and I was told that I was left a one-half interest in the Deer Lodge property, yes.

Q. Who told you that?

A. Oh, I don't know. I don't recall.

Q. How long did you remain in Los Angeles when you came down on this occasion of Mrs. Harley's passing away?

A. Well, that I can't recall, the exact number of days. I would say, oh, at least five or six days, maybe a week.

Q. Did you stay out at Mr. Harley's house any part of the time? [52]

A. No, the place was being occupied by her sister-in-law, and Mrs. Harley's nieces.

Q. Were you here on April 7, 1955?

A. April 7th? I can't—I couldn't say anything about—I mean, I can't say anything authentic about dates. I was here from March 20th until the time Dan Harley died on July 30th at least seven or eight times. He would call me up, and call me back, and want me to do something for him, and I don't know, and I couldn't specify any specified dates, no.

(Testimony of J. H. Grenier.)

Q. Did you ever hear a conversation with Mr. Dan L. Harley on or around the 1st of April, 1955, with reference to a contest that had been filed by Mrs. Benifer and Mrs. Kelly on the will of Mrs. Harley, Mrs. Tessie Harley? A. Yes, I did.

Q. You knew such a contest had been filed?

A. I did.

Q. Is that right? A. I did.

Q. And did you discuss that contest with Mr. Harley?

A. Well, not necessarily, I didn't, no. I had no occasion to discuss it, outside of wondering why she did it.

Q. Did he ever make any remarks to you concerning his attitude with reference to that contest?

A. Of the will? Yes.

Q. What did he say?

A. Well, she was trying to have him declared incompetent, and made administratrix of his wife's estate.

Q. When did that conversation take place?

A. Well, during that period of time. I couldn't say any exact time.

Q. After you had this conversation, where he expressed himself as you have indicated, he told you he was going to make another will, didn't he?

A. No, he did no such a thing. I wasn't here when that will was made, and I wasn't here when it was signed, and I didn't know anything about another will being made, that is, prior to my com-

(Testimony of J. H. Grenier.)

ing back. When he called me back again, then I knew there was another will in existence.

Q. Were you here when the incompetency hearing took place? A. Yes, sir.

Q. Did you go to court at that time with Mr. Harley? A. Yes, sir, I did.

Q. Is that right? A. Yes, sir.

Mr. Young: Let me see that file, will you, please?

(The document referred to was handed to counsel.)

Mr. Young: Your Honor, may I ask for a [54] stipulation with counsel?

The Court: You may.

Mr. Young: Will counsel stipulate that the answer of Mr. Dan L. Harley, in Case No. 363573 in the Superior Court of the State of California in and for the County of Los Angeles, in the Matter of the Estate and Guardianship of Daniel L. Harley, Alleged Incompetent,—that the answer of Mr. Harley to that petition requests the court that if a guardian is to be appointed for him, that his nephew, James Harley, be appointed guardian?

Mr. Boshae: Well, counsel, if it so states, I will stipulate. I haven't read the Answer, your Honor.

Mr. Young: Well, I thought you brought the file over.

Mr. Boshae: I didn't.

Mr. Young: Here it is (indicating).

Mr. Boshae: We will stipulate that in Paragraph VII, or, that the objections and answer of Daniel L. Harley to the Petition for Appointment of

(Testimony of J. H. Grenier.)

Guardian of his Person and/or Estate may be introduced into evidence by reference.

Mr. Young: May I read it into the record, your Honor, because this is a file of the Superior Court?

The Court: If there is no objection.

Mr. Young: If there is no objection, may I read that paragraph?

Mr. Boshae: Yes, counsel. [55]

Mr. Young: Quoting paragraph VII, page 3, of the Objections and Answer of Dan L. Harley to the Petition.

The Court: Filed what date?

Mr. Young: The date, your Honor?

The Court: The date when filed in the Superior Court.

Mr. Young: The date it was filed is April 7, 1955.

The Court: That is in the Los Angeles County Superior Court?

Mr. Young: In the Los Angeles County Superior Court, your Honor.

The Court: In proceeding number?

Mr. Young: Proceeding No. 363573, in the Matter of the Estate and Guardianship of Daniel L. Harley, an Alleged Incompetent Person. This is paragraph VII:

“Answering the allegations of paragraph VII, he alleges that he is not in need of a guardian, either of his person or of his estate. He further states and alleges that if he were in need of a guardian, he would request the appointment of his nephew, James W. Harley, Jr., as guardian of his

(Testimony of J. H. Grenier.)

person and/or estate. That James W. Harley, Jr. is a competent businessman, of the age of about 42 years, and resides in the City of Long Beach, California. That said James W. Harley, Jr. is willing to give him such help as may be needed without [56] the appointment of himself as a guardian. However, he, Daniel L. Harley, has not suggested or requested said nephew or anyone else to take any action for the appointment of a guardian of his person or estate, and he feels entirely capable of handling his own personal and business affairs.”

Q. Mr. Grenier, did you and Mr. Harley have a joint bank account together? A. Yes, sir.

Q. In what bank? A. The Security——

Mr. Boshae: Your Honor, I am going to object to that as irrelevant, incompetent and immaterial, as to any bank accounts, and submit, your Honor, that it is not within the issues of this case.

The Court: Overruled.

Q. (By Mr. Young): In what banks were these accounts maintained?

A. The Security Bank of Glendale, and the Bank of America in Glendale.

Q. And any other bank?

A. The Deer Lodge Bank & Trust Company of Deer Lodge, Montana.

Q. Did you and Mr. Harley have a joint safety deposit box during his lifetime? [57]

A. Yes, sir.

Q. Where was that located?

A. At the Bank of America in Glendale.

(Testimony of J. H. Grenier.)

Q. In Glendale? A. In Glendale.

Mr. Young: We offer in evidence, if your Honor please, the signature cards and the contract between Mr. Harley and Mr. Grenier and the Bank of America as the Plaintiff's Exhibit next in order,—No. 4, I believe, your Honor.

The Court: You offer them as a single exhibit?

Mr. Young: Well, there are three cards. I will identify them. The bank account at the Bank of America; the bank account at the Security-First National Bank, the Glendale Branch,—

The Court: I would suggest that you take them one at a time. The first will be Plaintiff's Exhibit 4 in evidence, the next Plaintiff's Exhibit 5 in evidence, and the third Plaintiff's Exhibit 6 in evidence.

Mr. Young: Thank you, your Honor.

(The documents referred to were marked Plaintiff's Exhibits 4, 5 and 6, and were received in evidence.)

Q. (By Mr. Young): Did you have any discussion with Mr. Harley with reference to opening these accounts as a joint account in your name and his?

A. Did I have any discussion with him? [58]

Q. Yes.

A. Yes. At his suggestion, he said, "I am going to make a joint account with you and I, so that you can handle the business—transact my business, such as paying bills, and so forth."

Q. And after these accounts were opened at the

(Testimony of J. H. Grenier.)

Bank of America and the Security Bank, did you draw checks and sign your name? A. Yes, sir.

Q. And you paid bills only with them?

A. That's right.

Q. Is that right? A. Yes, sir.

Q. Did you deposit any of your own money in any of these accounts?

A. No, I did not.

Q. After Mr. Harley died, what happened to the accounts?

A. What happened to the accounts?

Q. Yes.

A. I had it transferred into my name, because it was a joint account.

Q. You transferred the balances to your own individual name?

A. Transferred to my individual name. [59]

Q. Is that right? A. Yes, sir.

Q. Do you know Mr. Joseph H. Edgar?

A. Yes, sir.

Q. When did you first meet Mr. Edgar?

A. Well, that's questionable, too. I think it was in 1954, when he come to—I happened to be down visiting the Harleys at the time, and he come on one Saturday afternoon, with a letter of introduction from a lawyer back in Youngstown, Ohio, introducing him to Mr. Harley, and asking him, that is, he wanted Mr. Joe Edgar to act as an attorney for Miss Fanny Harley's part of the estate in Los Angeles.

(Testimony of J. H. Grenier.)

Q. When was the last time you saw Mr. Harley alive?

A. Well, I think I left here, in fact, I am positive I left here on a Thursday morning, which would be the 27th, I think,—let's see. The 27th in Las Vegas, the 28th in Salt Lake—no, it was the 28th, because it took me three days to get home.

Q. During the period of time from your first acquaintance, the first time you became acquainted with Mr. Edgar, down to the time Mr. Harley died, did you ever see Mr. Edgar in Mr. Harley's home?

A. Yes, pretty near—yes, at least once or twice a week.

Q. That would be when you were here? [60]

A. That is when I was here, yes.

Q. Yes. Now, on May 17th did you go to a stationery store in Glendale and purchase a deed?

A. Purchase a what?

Q. A deed, a form deed, warranty deed?

The Court: Is the original of Plaintiff's Exhibit 1 placed before the witness? Mr. Clerk, will you place it before the witness?

(The document referred to was passed to the witness.)

The Witness: Yes, at Mr. Harley's suggestion, I did. The form,—I purchased the form, yes, sir.

Q. (By Mr. Young): What is the date of that deed? A. The 16th day of May.

Q. Is that the date that you purchased the deed at the stationery store?

A. No, sir, it was not. That was the date that

(Testimony of J. H. Grenier.)

this was signed by a notary public and Mr. Harley.

Q. When did you purchase the deed?

A. Oh, I would say about a week or ten days prior to that.

Q. And where did you purchase it?

A. Well, that's something I couldn't tell you, where I purchased it.

Q. What did you do with it after you purchased it?

A. Took it down and had it recorded, according [61] to Mr. Harley's orders, and left it there, and I went back to Montana.

Q. When you purchased the deed which you were holding, it was blank, there wasn't any printing on it, was there? I mean, typed printing?

A. No, certainly not.

Q. Didn't you take that deed, after you purchased it, over to a public stenographer in Glendale?

A. Yes, I had the deed recorded—I mean, the description typed on this deed, the description of the property.

Q. Was that all that was typed at that time?

A. That's all, yes, that I know of.

Q. Wasn't the date typed in it?

A. No, there was no date typed in there.

Q. Will you look at the deed and state whether or not the typewriting of the public stenographer with reference to the description of the property and the date on the deed——

A. I say there was no date. I don't know. I

(Testimony of J. H. Grenier.)

guess, I imagine that was, that the date was typed on it.

Q. The date was typed in there? A. Yes.

Q. What date is there? A. The 16th.

Q. The 16th of May? A. Yes. [62]

Q. But yet you had the deed written up a week or ten days prior to the 16th of May; is that right?

A. Well, I don't remember that either. I wouldn't want to——

Q. What did you do with the deed after it was written up——

A. Left it with Mr. Harley.

Q. ——by the public stenographer?

A. Took it back to Mr. Harley.

Q. Did he sign it?

A. Signed it in front of the notary public, yes.

Q. Did he sign it the day that you took it back to him?

A. I don't remember that. I don't think so.

Q. Isn't it a fact that you took the deed back to him the day that the public stenographer filled it out, which was at least a week or ten days prior to May 16, 1955, and left it with him in his house?

A. I took it back to him, yes.

Q. He didn't sign it on that day that you took it back? A. Not that I recollect, no.

Q. After you took it back to him on the day that the public stenographer typed it, you left shortly thereafter and went back to Montana, didn't you? A. Yes, sir. [63]

Q. Then you returned to Los Angeles or Glen-

(Testimony of J. H. Grenier.)

dale on or about the 16th of May; is that right?

A. Well, approximately, yes.

Q. And on your return to Glendale, you stayed with Mr. Harley in his home; is that right?

A. Yes, sir.

Q. On the 16th of May, you went to the Bank of America and asked a notary public to accompany you to Mr. Harley's home; is that right?

A. Per Mr. Harley's instructions, yes, sir.

Mr. Young: May I ask that that answer be stricken as not responsive, "per his instructions"?

Mr. Boshae: I think he has asked that.

The Court: That is explanatory. He says yes, as I understand the answer, pursuant to the instructions.

Q. (By Mr. Young): Do you recall the name of the notary public?

A. Yes, very well. Miss Bretschneider.

Q. And you took her in your car from the Bank of America to Mr. Harley's home,——

A. Right.

Q. ——is that right? A. Right.

Q. And on that occasion did Mr. Harley sign the deed?

A. Sign the deed? Yes, he did. [64]

Q. In the presence of the notary public?

A. Yes.

Q. And then you gave the notary public a \$5 bill; is that right? A. Yes, sir, I did.

Q. And then you took her back to the Bank of America? A. I did.

(Testimony of J. H. Grenier.)

Q. Now, subsequent to the signing of this deed, did you have occasion to see the notary public again? A. Yes.

Q. With Mr. Harley? A. Yes.

Q. It is a fact that on or about the 18th of July you took Mr. Harley over to the Bank of America, and requested the notary public to come out to the car and acknowledge his signature on a general power of attorney in your favor; is that right?

A. That's right.

Q. And she did so; is that right?

A. That's right.

Q. At that time Mr. Harley was too weak to walk, wasn't he? A. No, he wasn't.

Q. But he didn't walk into the bank?

A. No, he didn't. [65]

Q. Is that right?

A. He walked out to the car, but he didn't walk into the bank.

Q. Now, what consideration did you give Mr. Harley for the deed of May 16th?

A. I didn't give him any consideration for it.

Q. How is it that you put revenue stamps on the deed?

A. Because the Clerk and Recorder of Powell County in Deer Lodge, Montana, told me to put the stamps on.

Mr. Young: I move to strike that answer, your Honor, as hearsay.

Mr. Boshae: Just a moment. Your Honor, he asked the question as to why he put the stamps on.

(Testimony of J. H. Grenier.)

The Court: May I see the deed, please?

(The document was handed to the court.)

The Court: Motion denied.

I notice there are \$13.20 stamps on the deed. How is it that you happened to put that amount on it?

The Witness: The Clerk and Recorder estimated the amount.

The Court: How did he estimate it?

The Witness: Through the—for the taxation—assessor's valuation of that particular piece of property.

The Court: In putting \$13.20 in stamps on, were you attempting to put on stamps equivalent to representing the value? [66]

The Witness: The Assessor's value, yes, sir. That is what the Clerk and Recorder suggested I do.

Q. (By Mr. Young): Isn't it a fact that the stamps, as they appear on this warranty deed, were placed by you on the deed in Los Angeles?

A. No, they were not. They were purchased and placed on the deed in Deer Lodge, Montana.

Q. Weren't those stamps on the deed at the time the signature of Mr. Harley was applied?

A. They were not on the deed. They were placed on the deed and bought in the post office at Deer Lodge, Montana.

Q. Was this property deeded to you by Mr. Harley as a gift? A. Yes, sir, they were.

Q. What did he say to you about that?

(Testimony of J. H. Grenier.)

A. What did he say?

Q. Yes.

A. Well, he wanted to change his will, he wasn't satisfied with his will. He told Mr. Edgar that his will stank, that he wanted to change it, and Mr. Edgar suggested that he wait until this trial was over with that his sister-in-law had instituted against him, in order to stop a lot of litigation and a lot of confusion. And Mr. Edgar suggested to him to wait until this trial was over.

So Mr. Harley got disgusted with it, and he said, [67] "I am going to change—I am going to do this, to see that this part of the will will be changed. I am going to give you, deed you the property."

Now, that is the sum and substance of that performance.

Q. What will did he refer to that stank?

A. The last one he drew, the one that Mr. Thompson was supposed to have drawn up for him, and Mr. Thompson was there, and while the signatures was on.

Q. The will that he told you stank was the one that Mr. Edgar——

A. He told Mr. Edgar that. He didn't tell me. He told Mr. Edgar.

Q. But you were present?

A. I was present, yes.

Q. And that was with reference to the will of March 22nd, in which he left a part of his property to his wife's sister, is that right?

(Testimony of J. H. Grenier.)

A. No, that was with reference to the will that he made in April, I imagine. Yes, in April.

Q. April 7th? A. Yes.

Q. What part of it did he say stank?

A. He said the whole will stank.

Q. The part where he left you an undivided one-half interest? [68]

A. No, he said the whole will stank.

The Court: One at a time, gentlemen.

The Witness: The whole will.

Mr. Young: Pardon me, sir.

The Court: Just wait until the whole question is put before you start answering, and you wait until the answer is completed before you start another question.

Mr. Young: Sorry.

Q. Did he specify any provision of the April 7th will that stank?

A. I just got through saying he said the whole will stank, and he was very much dissatisfied with it.

Q. Did he state to you that he was quite worried and concerned over the contest that was filed on his wife's will?

A. Did he say he was worried about that?

Q. Yes. A. No, he never did.

Q. Didn't he talk to you about it constantly?

A. No, he didn't.

Q. Isn't it a fact that you told Mr. Edgar on July 18, 1955, in Mr. Harley's home, in the presence of Dan L. Harley, that Mr. Harley deeded that Deer Lodge property to you so that it would not

(Testimony of J. H. Grenier.)

be involved in the contest of Tessie Harley's estate?

A. No. Mr. Harley was the one that told Mr. Edgar that he [69] had deeded the property to me, and Mr. Edgar made the statement, "I wish you hadn't done it."

Q. Were you present then?

A. Yes, I was present.

Q. When did that conversation take place?

A. That conversation happened around that period that you just mentioned. I can't remember those exact dates.

Q. How did you happen to insert in the deed that the consideration was \$1?

A. I don't know. I guess that's the way it was made up. I mean, that's the way a deed is made up, a consideration of \$1, or \$10, or something of that sort. I have had several deeds made up in transactions that I have made in property, and that's the way they are made up.

Q. You had some experience with them?

A. Quite a bit of it, yes, sir.

Q. With reference to different forms of deeds; is that right?

A. Yes, sir, in Montana.

Q. And you knew that there was a deed which was known as a deed of gift, didn't you?

A. That I what?

Q. You knew there was a form of deed known as a deed of gift?

A. I didn't know such a thing, because I was never up [70] against that kind of a proposition before.

(Testimony of J. H. Grenier.)

Q. This was the first time any property had ever been given to you as a gift; is that right?

A. That's right, yes.

Q. Did you ever tell Mr. Edgar that Dan L. Harley had deeded the Montana property to you?

A. I never told him. Mr. Harley told him.

Q. Did you ever tell him? A. No.

Q. Did you ever tell Mr. Jim Harley, his nephew, that Dan L. Harley,—

A. No, not that I remember.

Q. — had deeded the Montana property to you?

A. No, it wouldn't have been necessary for me to tell him, because Mr. Harley had already told him.

Q. Did you ever tell him?

A. No, I did not.

Q. When was the first time that you disclosed to Mr. Edgar that a deed to the Montana property had been signed by Dan L. Harley?

A. I never disclosed to Mr. Edgar. Mr. Harley disclosed to Mr. Edgar.

Q. On July the 18th or 19th, did Mr. Edgar say to you, "I understand that Dan has deeded the Montana property to you"? [71]

A. I just got through telling you, Mr. Young, that Mr. Harley told Mr. Edgar in front of me that he had deeded the property to me, and Mr. Edgar said, "I wish you hadn't done it."

Q. When was that?

A. That was during that period.

(Testimony of J. H. Grenier.)

Q. What period?

A. That you just mentioned.

Q. What date?

A. I don't know. Around in April or May, or somewhere around in there, around that period. As for dates, I would not want to commit myself, because I wouldn't know the exact date.

Q. Did you tell Mr. Edgar, when this conversation you are referring to took place, that you had consulted a Mr. Sturzenacker with reference to drawing the deed?

A. That is another thing that come up. Mr. Harley, being dissatisfied, asked me to find out, or to find some lawyer in case he wanted to change his will, to make a new will. I said I would, and I did.

Q. Did you tell Mr. Edgar on the occasion I have referred to, that you had conferred with Mr. Sturzenacker about drawing the deed?

A. I said I was talking to Mr. Sturzenacker.

Q. What is that? [72]

A. I said I had talked to Mr. Sturzenacker.

Q. About this deed of May 16th?

A. Not the deed, no; about a will.

Q. You never talked to Mr. Sturzenacker at all about the deed? A. No.

Q. You never talked to anybody but the public stenographer in connection with drafting the deed?

A. That's right.

Q. Is that right? A. That's right.

Q. How do you explain the fact that this deed

(Testimony of J. H. Grenier.)

bears the date of May the 16th, when it was written up ten days before that date?

A. Well, I don't know. I couldn't explain that at all. I don't remember that, regarding the date.

Q. Did you tell Mr. Edgar that the bank accounts, which were opened in your name and Dan L. Harley's name, the balances would be turned over to the administrator of Mr. Harley's estate as soon as one was appointed? A. No.

Q. You didn't tell him that? A. No.

Q. Did you tell Jim Harley on the day of the funeral, August 1, 1955, Dan L. Harley's funeral, that you were tired [73] of the wisecracks that he was making about the bills you were paying out of those joint accounts, and that just as soon as the administrator of Dan L. Harley's estate was appointed, you would turn the balances over to the administrator?

A. I didn't tell him any such thing. I told him I was tired of the cracks he was making regarding my handling the bank account.

The Court: We will take the morning recess at this time for five minutes.

(A short recess.)

The Court: You may proceed.

Q. (By Mr. Young): Mr. Grenier, have you received the rents from the Deer Lodge property subsequent to May 16, 1955?

A. Did I receive the rents?

Q. Yes. A. Yes, I have been.

Q. You have collected the rents?

(Testimony of J. H. Grenier.)

A. I have been collecting the rents since 1954.

Q. Since when? A. '54.

Q. 1954. You collected the rents, then, before the property was deeded to you? A. Yes, sir.

Q. But you put those rents, prior to the date of the deed, into Mr. Harley's bank account, didn't you? [74]

A. Mr. Harley's, Mrs. Harley's and mine. There was three of us on that bank account in Deer Lodge.

Q. In Deer Lodge? A. Yes, sir.

Q. And you checked on that bank account for the payment of taxes on that Deer Lodge property?

A. I did.

Q. You didn't deposit any money in that bank account? A. How is that?

Q. You didn't deposit any of your own money in that account? A. No, I didn't.

Q. What did the rents amount to since the date you collected them?

A. Well, \$235 a month I think is what the total rents come to.

Q. Each month? A. Yes.

Q. Subsequent to May 16th; is that right?

A. That's right.

Mr. Young: Your Honor, we have another file of the Superior Court here, in the Matter of the Estate of Dan L. Harley, Deceased, No. 368110, which is here with a deputy from the County Clerk's Office, with reference to which I wish, with

(Testimony of J. H. Grenier.)

the court's permission, to ask the witness some [75] questions.

May I have the places that I have marked brought to the attention of the witness?

The Court: You may.

The Clerk: There are three places here where he put slips in.

The Witness: To read this?

The Clerk: Yes.

Q. (By Mr. Young): Mr. Grenier, I have indicated in the file before you a petition to probate the will of Dan L. Harley. Are you examining that petition?

The Court: Do you find the petition?

The Witness: Is this the one, that is real estate, annual rent, fifteen hundred; stocks and bonds, annual income, five hundred; personal property,—

Q. (By Mr. Young): Yes, the one you are looking at, the petition for the probate of the will of Mr. Harley. A. Yes, sir.

Q. And on the inside of that petition is what purports to be a copy of a will; is that right?

A. Yes, sir.

Q. What is the date of that will?

A. This is the 28th of July.

Q. The 28th of July, 1955?

A. Yes, sir. [76]

Q. When did Mr. Harley die?

A. The 30th of July.

Q. Do you know what he died of?

A. Do I know what he died of?

(Testimony of J. H. Grenier.)

Q. Yes.

A. Well, no, not exactly. I don't know any medical term that I could apply to his death, outside of him being asthmatic, and maybe a heart ailment, or something of that sort. I couldn't tell you what he died of, no.

Q. You saw him on July 28th?

A. I saw him, yes, quite often, yes.

Q. In his home? A. Yes.

Q. Then you went back to Montana on July 28th? A. I left for Montana——

Q. You left here on July 28th, didn't you?

A. Yes.

Q. And he died two days later?

A. He died on the morning of the 30th.

Q. You know he had a severe cerebral hemorrhage, don't you?

A. You mean the cause of his death, then?

Q. Yes.

A. No, I didn't know what caused his death.

Q. You didn't know it. Now, this document that [77] you have inspected, does it have your signature on it, on the inside page; not on the top page, on the bottom of the inside page?

A. That is not my signature.

Q. Is that your signature?

A. No, it is not.

Q. What signature is there?

A. "Joe Grenier."

Q. That is not yours? A. No, sir.

Mr. Young: May I see the file, Mr. Clerk?

(Testimony of J. H. Grenier.)

The Witness: I have never signed my name as "Joe Grenier." I have always signed my name as "J. H. Grenier."

Q. (By Mr. Young): Well, I call your attention to the back of the petition, and the signature "Joe Grenier" and the verification acknowledged by a notary public, and ask you if that is not your signature which appears on the back of the petition.

A. No, sir, that is not my signature.

Mr. Young: May I see the file?

The Witness: As I stated before, I have never signed my name as "Joe Grenier."

Q. (By Mr. Young): Is the name "Joe Grenier," which appears in the two places on the petition, in your handwriting? [78]

A. Those two names you just——

Q. Yes.

A. They are not in my handwriting, and are not my signature.

Q. Were you down in the office of Mr. W. I. Gilbert, Jr. on or about the 10th day of August, 1955?

A. I was.

Q. Did you see Mr. Gilbert?

A. I saw somebody. I don't know whether it was Mr. Gilbert or not.

Q. Did you see Mr. Wunderlich?

A. Mr. who?

Q. Mr. Wunderlich, an attorney in Mr. Gilbert's office.

A. Wunderlich? Is he the attorney—no, I saw

(Testimony of J. H. Grenier.)

Mr. Wunderlich, yes, or Mr. Gilbert. I have got the law offices mixed up.

Q. Was this petition, which you have inspected, for the probate of the will presented to you when you were in their office?

A. Yes, it was presented to me.

Q. Did you read it over?

A. I don't recollect whether I did or not.

You want me to read this will?

Q. No, did you read it at the time you were in Mr. Gilbert's office, the petition which is now before you? [79]

A. No, I didn't read it.

Q. You didn't read it. Did you read the will, which is a part of the petition?

A. No, I didn't. I only knew this was the will that Mr. Whitworth was supposed to be the executor of.

Q. You were named as executor in that will, weren't you?

A. I was named as co-executor, wasn't I?

Q. As co-executor? A. Yes.

Q. And you were in court, in the probate court, when that will was presented for probate; is that correct? A. Yes.

Q. You are also named as a beneficiary in that will; isn't that correct?

A. For a diamond ring, or something of that sort, yes.

Q. And the balance of the bank accounts in these joint accounts?

(Testimony of J. H. Grenier.)

A. Yes, sir. I imagine that's it. I don't know. I never saw that. I never paid any attention to that.

Q. How much was in those joint accounts, those two bank accounts, when you took the balances out and put them in your own account?

A. That I wouldn't want to say, because I don't know the exact amount. [80]

Q. It was approximately \$8,000, wasn't it?

A. No, it wasn't.

Q. \$6,000?

A. Between five and six thousand.

Q. Now, a contest was filed on that will, wasn't it, by Mr. Jim Harley? A. Yes.

Q. Is that right? A. Yes.

Q. Now, turn to the next page there, which shows your answer to that contest. That is marked with the yellow piece of paper. Do you see it?

A. Is that the first one? I am reading something here, "Comes now the respondents, Joe Grenier and Garnet Studebaker, in answer to the amended objections,"——

Q. Yes.

A. Now, what do you want me to say to this? What are you asking me about this?

Q. Was Mr. Boshae your attorney, who prepared that answer for you and filed it?

A. I guess he was, yes.

Q. Was that answer verified? Look on the inside of the blue cover. A. Was it verified?

(Testimony of J. H. Grenier.)

The Court: He means, did you sign on the inside of the [81] blue cover, that you swore to it?

The Witness: Well, I don't see my signature there.

Mr. Young: May I go to the witness, your Honor, and indicate to him?

The Court: You may.

Q. (By Mr. Young): Let me show you.

A. Yes.

Q. I direct your attention to a document which is indicated, "Answer," and ask you to look at the inside of the blue cover.

A. Yes, sir.

Q. Do you see that signature, "Joe Grenier," there?

A. Yes, I do.

Q. Is that your signature?

A. I never signed my name, as I remember, as "Joe Grenier"; always as "J. H. Grenier."

Q. Is that your signature?

A. Just a moment. I want to see what this is.

It must be, I guess, but I never signed my name as "Joe Grenier," that I know of.

Q. Who is the notary on that signature?

A. That must be my signature, yes.

Q. Isn't that the same signature which appears on the other document I called your attention to, the petition to probate the will? [82]

A. I don't know. I never signed my name knowingly as "Joe Grenier." It has been "J. H. Grenier." I can't understand that signature.

Well, I guess I will have to say that that's my

(Testimony of J. H. Grenier.)

signature, but knowingly I never signed my name as "Joe Grenier."

Q. Both of them are your signature?

A. It must be. It must be.

Q. Mr. Grenier, were you in Los Angeles on the 23rd day or the 24th day of this month, October?

A. The 24th day of this month?

Q. Yes. A. Yes.

Q. In Mr. Boshae's office? A. Yes.

Q. Is that right? A. Yes.

Q. The contest that was filed by Jim Harley to revoke this will that you are named as executor or co-executor in came up for hearing on that day; is that right?

A. I guess maybe it did. I don't know.

Q. You did not come to court, did you?

A. No, because I wasn't interested, and Mr. Boshae told me it wasn't necessary for me to appear in court.

Q. You were not interested under Mr. Harley's will that left you a legacy of approximately \$6,000?

A. Mr. Boshae was the one——

Q. Just answer my question.

A. No, because Mr. Boshae told me that I wasn't involved, or I shouldn't be interested in that particular will.

Q. Well, that will recites, as I have already called your attention to, that you are a beneficiary under that will to the extent of approximately \$6,000; is that right?

(Testimony of J. H. Grenier.)

Mr. Boshae: Your Honor, I am going to object as asked and answered.

The Court: Sustained.

Q. (By Mr. Young): Mr. Grenier, it is a fact that you didn't come to court at that hearing because you knew when this will was executed, on the 28th day of July, 1955, that Mr. Harley was of unsound mind?

A. No, Mr. Harley was never of an unsound mind up to the day I left him, on the 28th day of July. Mr. Harley was a very brilliant man, had a wonderful mind, and he never lost his mind, which they tried to claim, that he was incompetent.

Q. Then why didn't you come to court and say so?

A. Because my attorney said I didn't have any business in court on that 24th, or whatever day it was.

Q. Under that will you also got a diamond, didn't you?

A. I think so. I don't know.

Q. And your wife was left a diamond?

A. I imagine she was. I don't know. I never [84] paid any attention to the will.

Q. And you were named in the will as executor to administer the affairs of your good friend's estate?

A. As a co-executor.

Q. As a co-executor. And you knew, and that is the reason you didn't come to court, that that will was obtained by undue influence and fraud?

A. I didn't know any such thing. I didn't know

(Testimony of J. H. Grenier.)

about the will until I come back on the 30th day of March, or of July.

Q. You say in this petition to probate this will that Mr. Harley, on the 28th day of July, 1955, was of sound and disposing mind, and was not acting under undue influence or fraud,—isn't that in that petition?

A. I say, when I left here,—

Q. I am talking about the petition that is before you? A. I didn't quite grasp that.

Mr. Young: May I approach the witness stand and show him, your Honor?

The Court: You may.

Q. (By Mr. Young): Calling your attention to paragraph VIII over your signature, that you have now identified as your signature:

“That at the time said will was executed, to wit, on the 28th day of July, 1955, the testator was [85] over the age of 18 years, to wit, of the age of 77 or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud or undue influence, and was in every respect competent by last will to dispose of all of his estate”?

A. Well, that was up to the time I left on the 28th day of July, he was competent, but what happened after I left I don't know.

Q. You also knew that your friend, Mr. Harley, was of unsound mind when he executed that deed to you on May 16, 1955.

A. I don't know no such thing. Mr. Harley was just as sane as you and I are right now, and just

(Testimony of J. H. Grenier.)

as capable as you and I. As he told Mr. Edgar, "I am sick at body, but I am not sick at mind."

Q. You also took advantage of his weakened physical condition and unsound mental condition, and told Mr. Harley on or about the 16th day of May, 1955, that if he put the Montana property in your name, he would protect himself in the contest on his wife's will?

A. No, I didn't make any such statement. I didn't know—didn't make any such statement, and I didn't know the statement you are trying to impress me, that I knew that Mr. Harley was of unsound mind. Mr. Harley was just as sound of mind as you and I are right now up to the time I left [86] him on the 28th day of July.

Q. And you also told Mr. Harley, when you opened up the joint bank accounts, that in doing that with you he would protect himself and not have those bank accounts involved in the contest of his wife's will?

A. I did not. Mr. Harley made those accounts, and stated the money that was left, "I want you to have."

Q. That is what he said in the will?

A. That is what he said to me.

Q. At the time the accounts were opened?

A. At the time the accounts were opened, yes.

Q. Why was it necessary for you to sign checks on his bank account?

A. Well, Mr. Young, you would have to ask Mr. Harley that. Mr. Harley,—if he wanted any-

(Testimony of J. H. Grenier.)

body else, people that were here, such as Joe Edgar, as you call him, and his nephew Jimmy, if he wanted them to handle his bank accounts, he would have had them, instead of calling me back from Montana all during that period, and having me sign and be on his bank accounts. He would have had those two on his bank accounts, and handling his affairs, but instead of that he had me. Evidently he had some faith in my judgment in handling his accounts.

Q. Well, he signed checks on his own accounts—— A. Yes, sure, he did. [87]

Q. ——right up to the last time you saw him on July 28th.

A. Sure, he did. When I was gone, he signed them, and when I was here, I signed them.

Q. Why was it necessary for you to sign them at all, if he could sign his own checks?

A. You would have to find that out from Mr. Harley, so that's—you would have to find that out from him. If he wanted Mr. Jim Harley or Mr. Joe Edgar to carry on as I was carrying on, he would have had them, and I would not have had to be running to and fro from Montana.

Q. What was the occasion for having him sign the general power of attorney in your favor on the 18th of July?

A. Because I had a power of attorney in Montana, to handle his affairs there, and it began to look like—Dan thought, well, he might as well have one here, so he had me get the form, and

(Testimony of J. H. Grenier.)

he had the power of attorney drawn up, so that I could act for him in California.

Q. Act in what way? You were already acting—

A. Acting in the way of handling his business.

Q. What business did he have, other than these bank accounts?

A. His bank accounts, and paying his bills, and so forth.

Q. You were already signing checks on his bank accounts. [88]

A. Well, he just wanted me to have the power of attorney, and I got it.

Q. Now, you had a safety deposit box over at the Bank of America that you were on, too; is that right?

A. Yes, sir.

Q. And had you ever gone to that box?

A. Yes, sir.

Q. And you had put securities in it?

A. Put securities in, and took them out and sold them, as per his instructions.

Q. And the signature card, which has been introduced in evidence here of the Bank of America, that is your signature?

A. Yes, sir.

Q. And that box had approximately \$8,000 of bonds and securities in it; is that right?

A. Well, I wouldn't know the exact amount, no.

Q. And when Mr. Harley died, even though you were the surviving tenant, joint tenant, as you were in these bank accounts, you made no claim to any of the bonds or securities in that box, did you?

(Testimony of J. H. Grenier.)

A. No, I wasn't interested.

Q. You signed off on the box and the securities, and turned them over——

A. I turned them over to you, yes. [89]

Q. ——over to the administrator, didn't you?

A. I turned them over to you. I didn't turn them over to the administrator.

Q. Did Mr. Harley ever tell you when he died those securities were to belong to you?

A. He didn't tell me anything about that.

Q. He didn't tell you anything about that?

A. No.

Mr. Young: That is all.

Mr. Boshae: I have no further questions.

The Court: You may step down.

(Witness excused.)

The Court: Your next witness.

Mr. Young: Mr. Jim Harley.

JAMES W. HARLEY

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: James W. Harley.

The Clerk: Be seated, please, Mr. Harley.

Direct Examination

Q. (By Mr. Young): Mr. Harley, you are the nephew of the decedent, Dan L. Harley? [90]

A. Yes, sir.

Q. And you are his only heir? A. Yes, sir.

(Testimony of James W. Harley.)

Q. And you are also the plaintiff in this action?

A. Yes, sir.

Q. And in your representative capacity as general administrator, with general powers, in the Estate of Dan L. Harley, deceased; is that right?

A. Yes, sir.

Q. With reference to the year 1955, do you recall the date your aunt passed away?

A. Aunt Tessie passed away on March 20th.

Q. 1955? A. 1955.

Q. At that time did you make any observation as to the condition of your uncle's health?

A. My uncle was in a general run-down condition at the time that Aunt Tessie died, because he had been naturally over-wrought, and over——

Mr. Boshae: Just a moment, your Honor.

Mr. Young: Just describe his condition.

Mr. Boshae: Will you stipulate that go out?

Mr. Young: Oh, yes.

The Court: What portion go out?

Mr. Boshae: All of it, your Honor. [91]

Mr. Young: No, not all of it.

Mr. Boshae: That portion relating to the run-down condition.

The Court: He says that is the way he appeared to him, the run-down condition. The portion about his being over-wrought may be stricken.

Mr. Young: That may go out.

Mr. Boshae: All right.

Q. (By Mr. Young): Go ahead and describe his condition, as you observed it at that time.

(Testimony of James W. Harley.)

A. Well, normally Uncle Dan's weight ran on the order of 135 to 150 pounds, and at the time that Aunt Tessie died, I recall him getting on the scale, and he was weighing just slightly over 100 pounds.

Q. That would be around March 20th?

A. March 20th.

Q. 1955. Had he suffered any serious illness that you knew about immediately prior to the time his wife passed away?

Mr. Boshae: To which I object as calling for a conclusion, and no proper foundation laid, your Honor.

The Court: Overruled. He may answer.

According to your understanding, had he suffered any?

The Witness: Dan had suffered an attack of pneumonia in February.

Q. (By Mr. Young): Of 1955? [92]

A. Of 1955.

Q. After your aunt passed away, to your knowledge, did he have any other illness, or any illness overcome him?

A. No specific illness, other than a continuous aggravation of the ones he already had, namely, the hernia, and difficulty with the respiration.

Q. What was that difficulty, as you observed it, with the respiration?

A. In general, it was a type of respiration trouble, apparently, where the lung would fill, and he

(Testimony of James W. Harley.)

would have difficulty in bringing up the mucus and matter of the lungs.

Q. Did he have a doctor? A. Yes.

Q. What was his doctor's name?

A. Dr. Ogden.

Q. Did he have more than one doctor?

A. At the very last there was another doctor.

Q. Did he have a nurse?

A. No. Oh, yes, at the last he had a nurse, Garnet Studebaker.

Q. When did she come on this case?

A. She came on the case, on Dan's case, you might say immediately on the demise of my aunt. However, she had been employed previously for my aunt.

Q. With reference to your uncle, did she stay [93] on his case after your aunt died?

A. Yes.

Q. For how long?

A. Up until the time of his death.

Q. And what was the nature of her attendance? How long was she there?

A. She was in continuous attendance.

Q. She stayed on the premises all the time?

A. Yes, to my knowledge.

Q. Did you ever observe your uncle taking any oxygen after your aunt died?

A. Oh, he took great amounts of oxygen.

Q. In your presence? A. Yes.

Q. All right. Now, on or around the 22nd day of March, 1955, after your aunt had passed away,

(Testimony of James W. Harley.)

were you present at a conversation between your uncle and Mr. Joseph Edgar, and Mr. Grenier?

A. Yes.

Q. And on that occasion state the conversation that you heard in the presence of the parties I have mentioned.

A. The conversation dealt specifically with the matter of Dan's will, in leaving—in how he was going to leave the property in Montana.

Mr. Boshae: To which I object, your Honor, as [94] not responsive to the question, and, certainly, a conclusion on the witness' part.

The Court: Overruled.

The Witness: In this conversation, the question came as to what Dan was going to do for Joe Grenier, which has been stated, and which was well known, that——

Q. (By Mr. Young): No, just state the conversation that you heard, who said this, and who said that.

A. Dan said, "What am I going to do with the property in Montana?" He said he wanted to leave a part of his property to Joe Grenier, that Joe had been his lifelong friend.

And I believe that it was Joe Edgar that asked Mr. Grenier if he wanted the property, or it may have been my uncle, I can't say specifically, but this was said, and Mr. Grenier replied that he didn't want any part of it, that he had everything that he needed.

(Testimony of James W. Harley.)

But my uncle said that in view of the fact that they had been friends, he wanted to leave him something.

And at this point the conversation went over to the idea that if Grenier did have half of the property, he would be on hand to take care of it, and collect the rents, and so forth, since he was a resident in the town in which the property was located.

Q. What was said, if anything, about the other half? Who was to get that? [95]

A. The other half was to be left to me.

Q. Now, subsequent to this conversation, did you have occasion to see Mr. Grenier again?

A. Yes.

Q. On how many occasions, or how many times?

A. Well, up to the time that—up to the time of the funeral, I would say on an average of once every ten days.

Q. And where would you see him?

A. At the 1330 Blossom Street home.

Q. That is your uncle's home? A. Yes.

Q. Did he on any occasion during that period ever tell you that your uncle had deeded the Montana property to him? A. No.

Q. Did your uncle ever at any time, after this conversation on or about March 20th, tell you that he had deeded the Montana property to Mr. Grenier? A. Yes.

Q. When?

A. Well, this was on or about June the 18th.

(Testimony of James W. Harley.)

Q. And where did that—where was he when he told you that? A. At home in Glendale.

Q. And who else was present at the conversation? A. Mr. Edgar. [96]

Q. And was that the first time that you knew that the Montana property had been deeded——

A. Yes.

Q. ——to Mr. Grenier? A. Yes.

Q. Now, after your aunt passed away in March, how frequently would you see your uncle up until the time he died?

A. Oh, for several—for several weeks I was going out and seeing him twice a week, usually on Wednesday and Saturday or Sunday.

Q. When is the last time you saw your uncle?

A. I saw him on the Wednesday preceding his death.

Q. Do you recall what date that was?

A. That would be on the 27th.

Q. He died on the 30th. The 27th?

A. On the 27th, yes.

The Court: We will take the noon recess at this time, gentlemen, until 2:00 o'clock.

Mr. Young: Very well. Until 2:00 o'clock, your Honor?

The Court: Yes.

Mr. Young: Thank you.

(Whereupon, at 11:52 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same date.)

Wednesday, October 31, 1956. 2:00 p.m.

The Court: The case on trial. 18715, Harley v. Grenier.

You may proceed, gentlemen.

JAMES W. HARLEY

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Young): Mr. Harley, did you go to court on the 7th of April, 1955, with your uncle in the incompetency proceeding? A. Yes.

Q. Did Mr. Grenier come to court?

A. Yes.

Q. Now, after that hearing did you return to your uncle's home in Glendale?

A. Yes, we returned there directly.

Q. Did you have a conversation with your uncle, in the presence of Mr. Grenier, after you returned home from court? A. Yes.

Q. Will you state that conversation, please?

A. Well, after we got home, we wheeled Dan out into the patio in a wheelchair, so that he could get a little bit [98] of sunshine and relax for a while, and discussed the various merits of the hearing in regard to his competency, and in this conversation, why, Dan stated himself that regardless of what the court found, he felt that he was incompetent.

Q. Now, with reference to that statement and

(Testimony of James W. Harley.)

the conversation you have referred to, were there any other occasions where you had a conversation with your uncle, in which he referred to himself or his mind?

A. Yes. It was some time later, and I feel that this must have been in the first part of July, as I recall it; maybe in the first week or two weeks of July. This followed the discussion which we had had with him about transferring that Montana property, and at that—after that discussion——

Mr. Boshae: Excuse my interruption: Was anyone else present?

Q. (By Mr. Young): I understand it was just with your uncle. No one was present except your uncle and you?

A. No one was present, with the possible exception of the nurse, Studebaker. I believe she was in the vicinity.

Q. Proceed.

A. Mr. Edgar suggested that I consult with you in regard to the transfer of this Montana property.

Mr. Boshae: Just a moment. Your Honor, I am going to object. This calls for hearsay testimony. I don't think that was the question, and I am going to object as incompetent, [99] irrelevant and immaterial, and hearsay.

The Court: Please guide the witness. Is he on the same conversation he started out on?

Mr. Young: Yes, your Honor.

Mr. Boshae: I understand, your Honor, he said that Mr. Edgar told him to see Mr. Young, and I

(Testimony of James W. Harley.)

didn't gather whether that was the same conversation.

The Court: We will have the reporter read it. I think you misunderstood it.

(The record was read.)

Mr. Young: I think probably that need not go in. I think I can connect it up.

The Court: You were asked for a conversation that you had with your uncle, as I understand it.

Mr. Young: That is right.

The Court: Weren't you?

The Witness: Yes, sir.

The Court: You weren't asked about Mr. Edgar saying something. You were asked what your uncle said and what you said at this time.

The Witness: Wasn't the question in regards to whether or not I had any other conversation with my uncle in regard to his competency?

The Court: Yes, but you were not asked what Mr. Edgar told you, unless it was a part of the conversation you had with your uncle. [100]

The Witness: I see, your Honor.

The Court: The question is: What did you say and what did your uncle say? That is what you are called upon to give us.

The Witness: To answer this question directly, I asked my uncle if he would concur to my being his guardian, since he felt that he was incompetent, and in this particular conversation he said that he would like to have me become his guardian.

Mr. Boshae: Said he would or would not?

(Testimony of James W. Harley.)

The Witness: He would.

Q. (By Mr. Young): Now, Mr. Harley, you have referred to your uncle as being in a wheelchair and being pushed around different places.

When, according to your own knowledge, did he commence to use a wheelchair?

A. This was right shortly after the incompetency suit.

Q. That was April 7th, to fix the date?

A. Yes.

Q. Is that right? A. Yes.

Q. To what extent did he use a wheelchair after you first saw him use it?

A. All the time, if he had any particular great distance to go. [101]

Q. Well, around the house, when he was in the house? A. Yes, in the house.

Q. How was your uncle attired after April 7th, when you would see him in the house?

A. I didn't get the question.

Q. How was he attired when you would see him in the house?

A. Oh, nearly always in his pajamas and robe.

Q. And after April 7th, up to the time he died, how much of his time did he spend in bed?

A. Well, of course, all of his nights in bed, and the rest of the time he was usually lying on the lounge, or in bed.

Q. Now, with reference to April 7th, as I understood your testimony this morning, you saw him approximately two times a week? A. Yes.

(Testimony of James W. Harley.)

Q. Following April 7th, up until the time he passed away? A. Yes.

Q. Is that right? A. Yes.

Q. On those occasions that you saw him, and after April 7th up until the time he passed away, did you ever talk to him about his health, or did he ever tell you anything about it? [102]

A. Oh, yes, on every visit.

Q. What did he say to you?

A. He said that he was getting progressively worse all the time, he couldn't breathe.

Whenever you would try to engage him in any conversation at all, he tended to drift off, sometimes go to sleep. He was not alert mentally as a result of this.

Q. With reference to his weight, did you have occasion to observe what happened, if anything, in that connection?

A. The last time I weighed my uncle was shortly after that incompetency suit, and at that time he weighed 85 pounds.

Q. How old was your uncle when he died?

A. 77.

Q. During the times you visited with him, as you have testified, did you have any occasion to engage in conversation with him, where he said anything about his eyesight?

A. Oh, yes, he said his sight had failed to the point where he didn't read anything any more.

Q. That was after April 7th? A. Yes.

Q. And up until the time he passed away?

(Testimony of James W. Harley.)

A. Yes.

Q. Now, with reference to his eating, what was his situation there, as you observed it? [103]

A. Well, he was an extremely light eater, and any food that was brought into him, he didn't want to eat it at all.

Q. Did you see Mr. Grenier on August 1, 1955?

A. Yes.

Q. Was that the date of the funeral?

A. Yes.

Q. Where did you see Mr. Grenier?

A. Pardon, the funeral wasn't on August 1st.

Q. Well, did you see Mr. Grenier, then, on or about August 1st? A. Yes.

Q. Where?

A. At the Blossom Street house.

Q. Did you have a conversation with him on that occasion? A. Yes.

Q. State the conversation.

A. Well, at this time Mr. Grenier approached me, and said that he was tired of listening or hearing about any cracks being made in regards to the way he was handling Dan's business and using the money in those joint bank accounts.

He stated at this time that he felt that he was a businessman and competent to handle them properly. He further stated that at such a time as the court appointed an executor that he would turn over all of the accounts and the business of the estate to the executor. [104]

Mr. Young: Cross examine.

(Testimony of James W. Harley.)

Cross Examination

Q. (By Mr. Boshae): Mr. Harley, is it not true that you didn't see your uncle very often prior to the death of your Aunt Tessie?

A. Very often?

Q. In fact, you never did visit there more than once or twice a year; isn't that correct?

A. That is not correct.

Q. How often did you visit there?

A. Oh, I would say that we would take a run over there probably once every month, six weeks, and they would come over to our house on three or four different occasions.

Q. Did you ever handle any business for your uncle, Mr. Dan Harley? A. No.

Q. As a matter of fact, he never asked you to handle any of his bank accounts, did he?

A. No.

Q. And you did not handle any of his financial business, did you? A. No.

Q. And you did not assist him, nor did you prepare any checks for him, did you, for his signature? [105] A. Oh, no.

Q. And yet you were visiting him quite frequently after your Aunt Tess died; is that correct?

A. Yes.

Q. Now, I believe you said, Mr. Harley, that you were present in court at the time of the guardianship proceeding? A. Yes.

Q. And you were in court when the court declared that your uncle was competent?

(Testimony of James W. Harley.)

A. Yes.

Mr. Boshae: Mr. Young, do you have any objection to my introducing an order in that proceeding?

Mr. Young: Your Honor, may I invite a similar stipulation from counsel in connection with his suggestion?

The Court: You may.

Mr. Young: Have you any objection to the copy of the order of Judge Schweitzer, dated October 30, 1956, in the proceedings with reference to the probate of the will, in which he found that the testator, Mr. Daniel Harley, was incompetent?

Mr. Boshae: With the further stipulation, counsel, that it was taken by default, no contest.

Mr. Young: Well, the order recites all of the appearances, and it was not a default. It was a hearing, on notice, and you were attorney of record, and you did not come.

Mr. Boshae: That is correct. [106]

Mr. Young: It wasn't a default. We proceeded and tried the case, and you were not there to put in a defense.

Mr. Boshae: In other words, there was no contest in the proceedings actually in court, no opposition.

Mr. Young: Nobody was there to oppose it, that is correct.

Mr. Boshae: With that stipulation, I have no objection.

(Testimony of James W. Harley.)

The Court: Very well. Do you offer it in evidence?

Mr. Young: I offer the order, then, of October 30th of Judge Schweitzer in evidence.

Mr. Boshae: I would like also to offer——

The Court: Just a moment. One at a time. The offer by plaintiff is received in evidence, pursuant to stipulation, as Plaintiff's Exhibit 7, Mr. Clerk?

The Clerk: Yes, your Honor, Plaintiff's Exhibit 7.

(The document referred to was marked Plaintiff's Exhibit 7 and was received in evidence.)

The Court: Now, what is your offer?

Mr. Boshae: My offer is to offer the order denying petition for appointment of guardian of the person and/or estate of an alleged incompetent person, Daniel L. Harley, in proceedings in the Superior Court of the County of Los Angeles, State of California, in the Matter of the Estate and Guardianship of Daniel L. Harley, an alleged incompetent person, No. 363573, dated April 13, 1955.

The Court: Pursuant to stipulation, the petition will be received as Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A.

(The document referred to was marked Defendant's Exhibit A and was received in evidence.)

Q. (By Mr. Boshae): Now, Mr. Harley, I think you stated on direct examination that Mr. Edgar, or your uncle told you that he had given a deed

(Testimony of James W. Harley.)

to the Montana property to Mr. Grenier; is that correct? A. Yes.

Q. That was on or about June 18, 1955; is that correct? A. Yes.

Q. Now, when did you have this conversation with your uncle, in which you stated that he told you that he felt that he was not competent?

A. This was stated on at least two occasions that I know of. Which occasion do you have reference to?

Q. The first one first, please.

A. The first time that Dan made such a statement was on the day that we got back from court, from the incompetency hearing.

Q. All right. At that time, and when was the next statement?

A. The next statement was on or about July the 9th or 10th.

Q. That was after you knew that Mr. Grenier [108] had gotten title to the property in Montana; isn't that right? A. Right.

Q. Now, referring to the first statement, where Mr. Dan Harley told you that he felt that he was not competent, did you take any proceedings or initiate any proceedings to have yourself appointed as guardian? A. No, I did not.

Q. Also, with reference to the second conversation, which took place on or about July the 7th, 8th or 9th, is that correct,— A. Yes.

Q. —did you take any proceedings, or initiate any proceedings for or on behalf of Dan L. Harley,

(Testimony of James W. Harley.)

to have someone or yourself appointed as a guardian of his estate or person?

A. No, because——

Q. Now, Mr. Harley, did you do anything, or initiate any proceedings of any kind after June the 18th, take any action to set aside the deed from Dan Harley to Joe Grenier prior to his death?

A. On advice from my counsel,——

Mr. Boshae: I am not asking you that.

Mr. Young: Just a moment. Your Honor please, I think he is entitled to answer. Proceedings are not confined to legal proceedings. [109]

The Court: He may answer first, and then explain it, if he wants to.

Answer the question first. Then if you want to explain why you did what you did, you may do so.

The Witness: No.

The Court: And the reason is, if you want to say?

The Witness: And the reason for it was that on the advice of my counsel, Mr. Young, I couldn't, as an individual, take any legal action to have this set aside, unless I had been appointed guardian, and I didn't want to upset my uncle to the point of forcing such an issue unless he would concur.

Mr. Boshae: I am going to move to have the last portion, of what he wanted to do, stricken as not responsive.

The Court: That is explanatory. Motion denied.

Mr. Boshae: Thank you.

Q. (By Mr. Boshae): Did Mr. Young also tell

(Testimony of James W. Harley.)

you it would be necessary for Mr. Dan Harley to authorize such a proceeding before you could initiate any? A. No.

Q. Did you ever take Mr. Dan Harley to the bank at any time? A. No.

Q. As a matter of fact, Mr. Harley, you knew that your uncle was writing checks and transacting his business in the absence of Mr. Grenier, didn't you? [110] A. Yes.

Q. And was writing these checks as late as July of 1955; isn't that correct? A. Yes.

Q. During Mr. Grenier's absence. Did you ever ask your uncle to transact any of his business for him?

A. The only business that I took care of for him was to take care of details relative to my aunt's burial out in—that is, getting her headstone and the details relative to the cemetery proceedings.

Q. Do you know your uncle's signature when you see it? A. Yes.

Q. Just excuse me a second, your Honor please.

Mr. Harley, you also knew that your uncle was signing his checks without the assistance of anybody showing him how to put his signature on those check lines; isn't that correct?

A. I can't answer that in the affirmative and directly, as being all-inclusive, because sometimes he needed assistance, and sometimes he didn't. Sometimes his hand had to be put on the line. Otherwise he was lucid enough where he could write by himself, without assistance.

(Testimony of James W. Harley.)

Q. Did you ever put his hand on the line when he was signing a check?

A. Not a check. I did have to help put his hand on the line one time on some other business, having to do with [111] the transfer of the 38th Street house.

Q. That was conveyed to you, was it not?

A. That was conveyed to me.

Q. And that was by reason of the fact that you had inherited some property from your aunt; isn't that correct?

A. No, I had received no property from my aunt. Dan gave that to me as a gift.

Q. The service station property, is that what you are referring to?

A. No, I am referring to the old home on 38th Street.

Q. Mr. Harley, will you please look at these checks and tell us whether or not you recognize your uncle's signature on these.

(Witness examines checks referred to.)

The Witness: There are only two signatures here which I would question. Of course, one of them was signed by Mr. Grenier, and the rest of them, I am reasonably sure that they are all Dan Harley's signature, with the exception of this one. This one, I am not sure of this.

Q. (By Mr. Boshae): Would you say that it was not his signature?

The Court: That one being what? The record will not show.

(Testimony of James W. Harley.)

Mr. Boshae: A check. The witness is showing me a check No. 117, dated July, 1955, made payable to Garnet Studebaker, [112] in the amount of \$100.

The Court: Is that correct?

The Witness: That is correct, your Honor.

Q. (By Mr. Boshae): Now, would you say that that was not his signature?

A. No, I wouldn't say that.

Q. In other words, it doesn't appear as clear to you as the others? A. No.

Q. Is that correct? A. The rest are.

Q. Are his signatures. Now, can you tell me whether or not the entire check is in his handwriting, the checks I have shown you?

A. No, they are not.

Q. Is it your testimony that none of them are in his writing, except his signature?

A. That one is all in his writing.

Mr. Young: Refer to it as to date.

Mr. Boshae: Let him pick them out, Mr. Young.

Mr. Young: All right.

Mr. Boshae: And then I will put them in the record.

Q. Now, have you segregated them, Mr. Harley?

A. I would say that Dan wrote all of these checks (indicating). [113]

Q. Would you look at these checks over here?

A. And he did not write these (indicating).

Q. Would you check and look at this?

(Testimony of James W. Harley.)

A. That is Dan's. The nurse wrote these two (indicating).

Mr. Boshae: Now, your Honor, for the purpose of identifying these groups of checks, I would like to have this group here, which has at the top a check dated June 20, 1955, made out to Alert Ambulance, in the amount of \$14.76, signed by Dan L. Harley, which is the group of checks which this witness has testified was in the entire handwriting of Dan L. Harley,—

The Court: Is that correct?

The Witness: That is correct, your Honor.

The Court: Do you wish to offer them in evidence?

Mr. Boshae: Yes, I do, your Honor.

Mr. Young: No objection.

The Court: Received in evidence. As Defendant's Exhibit B, Mr. Clerk?

The Clerk: Yes, B, your Honor.

(The checks referred to were marked Defendant's Exhibit B and were received in evidence.)

Mr. Boshae: You can probably staple them together, Mr. Clerk.

Q. Now, Mr. Harley, would you kindly look over this group of checks, and see if you can identify Mr. Harley's [114] signature on them, please?

(Witness examines checks referred to.)

Mr. Boshae: Now, if the court please, while the witness is examining those checks, may I offer this group of checks into evidence, which has at the top

(Testimony of James W. Harley.)
a check dated—it is check No. 116, dated June 30, 1955, made out to Walter R. Ogden, M.D., in the amount of \$40, and signed by Dan L. Harley, which is the group of checks not made out entirely in his handwriting, but only signed by him.

Q. Is that correct, Mr. Harley?

A. That is correct.

Mr. Young: No objection.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit C.

(The checks referred to were marked Defendant's Exhibit C and were received in evidence.)

Q. (By Mr. Boshae): Mr. Harley, in looking over those checks, would you kindly segregate the checks which are entirely in Mr. Dan Harley's own handwriting, and those which bear only his signature, please, including this group?

A. These, Dan wrote all of these (indicating), and somebody else wrote these (indicating).

Mr. Boshae: Let's dispose of this group of checks first.

Again, your Honor, I would like to introduce this group of checks, which has at the top a check dated May 24, 1955, [115] made out to the Reader's Digest Association, in the amount of \$3, check No. 72, which are the checks which the witness testified were made out entirely in Dan L. Harley's handwriting.

Q. Is that correct, Mr. Harley?

A. That is correct.

(Testimony of James W. Harley.)

Mr. Boshae: As defendant's next in order.

Mr. Young: No objection.

The Court: Received in evidence. As Defendant's Exhibit——

The Clerk: D in evidence.

(The checks referred to were marked Defendant's Exhibit D and were received in evidence.)

Mr. Boshae: May I make the observation, your Honor, that these checks are not necessarily in chronological order?

The Court: Very well.

Mr. Boshae: The top check is merely to identify the exhibit.

The Court: Very well.

The Witness: These Dan made out (indicating), and these, it looks like the nurse.

Q. (By Mr. Boshae): So that I can get your testimony correctly, Mr. Harley, the group of checks which I hold in my hand are also another group which Mr. Dan Harley made out entirely in his own handwriting?

A. As near as I can determine. [116]

Mr. Boshae: Let's offer this next in order, this group of checks, which has on top check No. 726, dated February 19, 1955, made out to Savemart Market, in the amount of \$100, which is a group of checks which the witness testifies were made out entirely in the handwriting of Daniel L. Harley.

The Court: Is that correct?

The Witness: That is correct, your Honor.

(Testimony of James W. Harley.)

The Court: Received in evidence. As Defendant's Exhibit——

The Clerk: Defendant's Exhibit E in evidence.

(The checks referred to were marked Defendant's Exhibit E and were received in evidence.)

Mr. Boshae: The next group of checks that the witness has handed me are a group of checks which has on top check dated July 7, 1955, No. 129, made out to Harry T. Innocent, in the amount of \$50, which the witness testifies has on them only the signature of Dan L. Harley, and the other portions were made out by someone else. I would like to offer them as next in order for the defendant.

The Court: Received in evidence as Defendant's Exhibit F.

The Clerk: Defendant's Exhibit F in evidence.

(The checks referred to were marked Defendant's Exhibit F and were received in evidence.)

Mr. Boshae: I have no further questions, your Honor. [117]

The Court: Any redirect?

Mr. Young: Yes, your Honor, one or two questions, if I may, please, sir.

The Court: You may.

Redirect Examination

Q. (By Mr. Young): Mr. Harley, a number of these checks which you have identified, and which counsel has introduced in evidence, are payable to the Alert Ambulance Service. Do you know what the purpose of those checks was?

(Testimony of James W. Harley.)

A. The main purpose of those checks to the Alert Ambulance was to pay for oxygen.

Mr. Young: For oxygen. May I approach the witness box, your Honor?

The Court: You may.

Q. (By Mr. Young): I show you a check dated May 16, 1955, on the Security-First National Bank, payable to the Alert Ambulance Service, and signed, "J. H. Grenier." Do you recognize that signature as being Mr. Grenier's signature? A. Yes.

Mr. Boshae: We will stipulate that both of those checks were signed by Mr. Grenier.

Mr. Young: The one on May 16th, as well as the check [118] on May 17th?

Mr. Boshae: Whatever the date is on them.

Mr. Young: Very well. Then, your Honor, we offer the check that is dated May the 16th as Plaintiff's Exhibit 8, I believe.

The Court: Received in evidence.

The Clerk: Plaintiff's Exhibit 8 in evidence.

(The check referred to was marked Plaintiff's Exhibit 8 and was received in evidence.)

Mr. Young: And the check dated May 17th as Plaintiff's Exhibit 9 in evidence.

The Court: Received in evidence.

The Clerk: Plaintiff's Exhibit 9 in evidence.

(The check referred to was marked Plaintiff's Exhibit 9 and was received in evidence.)

The Court: Anything further?

Mr. Young: That is all, your Honor.

Mr. Boshae: I have just one more question.

(Testimony of James W. Harley.)

Recross Examination

Q. (By Mr. Boshae): Mr. Harley, is it not true that Mr. Dan Harley did not necessarily use oxygen continuously, that he had tanks there in reserve whenever he needed them; isn't that correct?

A. That is correct. [119]

Mr. Boshae: I have no further questions.

Mr. Young: That is all.

The Court: You may step down, Mr. Harley.

(Witness excused.)

The Court: Plaintiff's next witness.

Mr. Young: Yes, your Honor. I wish to offer in evidence the statement of the Bank of America, which I show counsel, showing the balance that was in that joint account after Mr. Harley died, which was transferred to Mr. Grenier.

Any objection?

Mr. Boshae: I have an objection, your Honor, on the ground it is irrelevant, incompetent and immaterial, and does not tend to prove or disprove any of the issues in this case.

The Court: Is it stipulated the document itself is genuine in all respects in which it purports to be?

Mr. Boshae: Yes, your Honor.

The Court: The objection is overruled.

Mr. Boshae: Thank you.

The Court: And the document is received as Plaintiff's Exhibit——

The Clerk: 10. Plaintiff's Exhibit 10 in evidence.

(The document referred to was marked

Plaintiff's Exhibit 10 and was received in evidence.)

Mr. Young: Plaintiff offers in evidence, your Honor, a photostatic copy of the signature card of the joint account [120] of Dan L. Harley or J. H. Grenier at the Security-First National Bank, Glendale Branch.

Mr. Boshae: We will make the same objection, your Honor, and we will not question the fact that they are a copy of the records of the bank.

The Court: Will you stipulate that they are genuine in what they purport to be?

Mr. Boshae: Yes. They are photostats, however, your Honor.

The Court: There is no objection on that account, either, as I understand it?

Mr. Boshae: That is correct, excepting that we do not think they are relevant, competent or material, or go to prove or disprove any of the issues.

The Court: That objection is overruled, and it is received in evidence.

The Clerk: Plaintiff's Exhibit 11.

(The document referred to was marked Plaintiff's Exhibit 11 and was received in evidence.)

Mr. Young: Plaintiff offers in evidence, your Honor, a photostatic copy of the bank account of J. H. Grenier of the Security-First National Bank, showing the balance that was due in the joint account on September 1st.

I withdraw that offer. I have no correct records at this time. I thought I had them. [121]

Is Dr. Ogden in the courtroom?

Mr. Boshae: No, counsel. I contacted him, and I expect him here tomorrow morning.

Mr. Young: That is all right, your Honor. I am ready to close plaintiff's case, but counsel and I stipulated that we would not duplicate subpoenas or serve subpoenas on the same witness. So he advised me that Dr. Ogden would be here, and for that reason I did not subpoena him.

Mr. Boshae: I could have got him here this afternoon, your Honor, except that I did not know that Mr. Young was going to use him in his case in chief. He asked me about the subpoenas, but I didn't know.

Mr. Young: Well, I would have used him, yes. I thought he would probably be here.

The Court: You may reopen your case for that.

Mr. Young: Yes, your Honor.

Your Honor, the plaintiff respectfully moves the court to file an amendment to the amended complaint, which sets up the legal description of the real property which is involved in this action.

In the amended complaint we referred to it as certain business buildings in Deer Lodge, Montana, and state we will supply—or it may have been in our pretrial statement of facts—that we would supply the legal description when it was ascertained, and this is the legal description which is [122] contained in the deed, which is in evidence. And the amendment also sets forth the question of the rentals that have been received, as the defendant testified on the witness stand this morning. That

allegation was not set forth in the amended complaint, and I believe that is in issue in this action, which is properly before the court on the testimony of the defendant.

Mr. Boshae: If the court please, I have no objection to the amendment with relation to the description of the property.

However, in connection with the further claim of rents, in reliance upon the fact that it wasn't originally alleged, I have not all my records in connection with the expenses disbursed by my client in connection with that property.

Now, if counsel will stipulate that what Mr. Grenier will testify to insofar as expenditures are concerned to offset the rentals, I have no objection, but if we don't get that stipulation, your Honor, I am not prepared to stipulate to the filing of the other portion.

Mr. Young: Your Honor please, I always like to stipulate, but it seems to me that that situation about the expenditures on the buildings,—the property did not belong to Mr. Grenier, and if your Honor should so find, that he would not be entitled to any reimbursement for expenditures.

The Court: Do you offer a stipulation as to what [123] the expenditures have been since the death of the decedent?

Mr. Boshae: We will offer testimony on that, your Honor.

The Court: Can't you offer the stipulation right now?

Mr. Boshae: As to what the expenses are?

The Court: Yes.

Mr. Boshae: Can I have a few minutes, and I probably can.

The Court: Yes. We will take the afternoon recess at this time for five minutes.

(A short recess.)

The Court: You may proceed.

Mr. Young: We had made a motion, your Honor, to file an amendment to the amended complaint, and you had asked for a statement from counsel as to the expenditures.

Mr. Boshae: The amount I have, your Honor, is \$1,498.93.

The Court: How do you itemize it?

Mr. Boshae: There are taxes, \$385.39 for 1955; and installation of a roof, \$514.50; repair of floor as the result of dry rot, \$174.55; repair in the cement of \$12.10; replacing or the repairing of glass, \$4; painting of casings and doors, \$215; and building insurance, \$193.39.

The Court: Have all those expenditures been necessarily incurred, and have they been paid?

Mr. Boshae: Yes, your Honor, they have been paid, and [124] were found necessary for the proper maintenance of the building.

The Court: You have heard those statements, Mr. Grenier. Are they correct?

Mr. Grenier: Yes, your Honor.

The Court: Very well. Are you willing to stipulate that those expenditures have been reasonably and necessarily incurred?

Mr. Young: I will, your Honor, yes.

The Court: For the upkeep of the property?

Mr. Young: Yes.

The Court: And for the maintenance of it?

Mr. Young: Yes.

The Court: Do you have that itemization written down?

Mr. Boshae: I just have it on a piece of paper here, your Honor. I can put it down.

The Court: You might write it on a paper suitable for an exhibit.

Mr. Boshae: Yes, I will put it down here.

The Court: If you will.

Mr. Boshae: I will hand it to the clerk after I have it itemized.

The Court: Very well.

Mr. Boshae: With the other stipulation, your Honor, that the material allegations of the amendment will be deemed [125] denied by the defendant, I will stipulate.

Mr. Young: So stipulated.

The Court: Very well. Then the amendment to the complaint may be served and filed, and all the material allegations of the amendment are deemed denied.

Mr. Young: I have served counsel with a copy, your Honor.

Mr. Boshae: We will stipulate we have received service of this, your Honor, service of the amendment.

The Court: Very well. You may lay it there, if you will, for the clerk.

Mr. Young: I have the amendment and a copy, your Honor.

The Court: They will be filed. Does the plaintiff have anything further to offer?

Mr. Young: Yes, your Honor. I have located the records from the Security Bank that I wish to introduce in evidence, and I have shown them to counsel, the photostatic copy of the Security-First National Bank account in the name of Dan L. Harley or J. H. Grenier, showing a balance on August 5th of \$2,722.24.

We offer that statement in evidence, your Honor.

The Court: Received in evidence.

(The document referred to was marked Plaintiff's Exhibit 12 and was received in evidence.)

Mr. Young: And we offer a photostatic copy of the [126] Security-First National Bank account, showing the opening of an account by Mr. Grenier on August 5, 1955, and showing the deposit by him on that day of the sum of \$2,749.24.

Mr. Boshae: Of course, your Honor, we will make an objection on the ground it is incompetent, irrelevant and immaterial, and has no bearing to prove or disprove the issues of this case.

The Court: As to all of these documents, it is subject to your objection, but you will stipulate they are genuine in all respects that they purport to be?

Mr. Boshae: Yes, there is no objection to the authenticity of the documents.

The Court: Or to the fact that a copy is used instead of the original?

Mr. Boshae: That is correct.

The Court: The Security Bank statement last received would be Exhibit 12, would it not?

Mr. Young: Yes, your Honor, I believe No. 12.

The Court: And this would be Exhibit 13, comprising two items, does it not?

Mr. Boshae: I take it your Honor has overruled the objection?

The Court: Yes, the objection that it is incompetent, irrelevant and immaterial will be overruled.

(The document referred to was marked Plaintiff's Exhibit 13 and was received in evidence.)

Mr. Young: Now, your Honor, with the exception of Dr. Ogden, the plaintiff has concluded his case.

The Court: Very well.

Mr. Boshae: If the court please, I won't want to prejudice the defendant's right to make a motion to dismiss, and I would like to reserve that opportunity until after——

The Court: Suppose you make the motion now, at the close of the plaintiff's case, or do you want to reserve it until after the plaintiff examines Dr. Ogden?

Mr. Boshae: That is what I thought, your Honor. Probably it would be better.

The Court: Is there any objection?

Mr. Young: No objection, your Honor.

The Court: It will be so reserved.

Mr. Boshae: To reserve it until that time.

The Court: Very well.

Mr. Boshae: Shall we proceed, your Honor?

The Court: Yes.

Mr. Boshae: Mrs. Bretschneider, please.

EVA LEE BRETSCHNEIDER

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Court: Will you state your name and address, please? [128]

The Witness: My name is Eva Lee Bretschneider.

The Court: How do you spell that?

The Witness: E-v-a L-e-e B-r-e-t-s-c-h-n-e-i-d-e-r.

The Court: Eva Lee Bretschneider, is that correct?

The Witness: Yes, sir.

Direct Examination

Q. (By Mr. Boshae): Mrs. Bretschneider, what is your business or occupation, please?

A. I am an escrow officer at the Bank of America.

Q. Are you also a notary public?

A. Yes, I am.

Q. Were you a notary public during the year 1955?

A. Yes, sir.

Q. Mrs. Bretschneider, did you have occasion to see or speak to Mr. Daniel L. Harley?

A. Yes, sir.

(Testimony of Eva Lee Bretschneider.)

Q. Would you tell the court when you saw him during 1955, please?

A. Well, the first time I saw him I didn't speak to him, but I saw him when he came into the bank to open an account, and the day I first met him and was introduced to him was the day I——

Mr. Boshae: Just a minute, please. Shall we proceed, your Honor? [129]

The Court: Yes.

Q. (By Mr. Boshae): Go ahead.

A. ——was the day I notarized the deed.

Q. Now, the first time was when, Mrs. Bretschneider, if you can recall?

A. I don't recall the day the account was opened. We have the signature cards, which would give that exact date.

Q. With relation to the date you notarized the deed, can you give us an approximate date or time?

A. Well, it was within a matter of a few weeks, I would say.

Q. A few weeks before you notarized the deed?

A. Yes, a few days or weeks. I don't recall.

Q. Did you observe him at that time?

A. Well, I saw him in there. He was in a wheel-chair with Mr. Grenier, and I did see him, but I didn't speak to him.

Q. Did he appear rational at that time?

A. Yes.

Q. Now, with relation to the time that you said you saw him when the deed was notarized, would

(Testimony of Eva Lee Bretschneider.)

you tell us — first, give us the date, if you will, please?

A. I can look at my book and tell you the exact date.

(Referring to book.) It was on May 16, 1955.

Q. And where did you see him, Mrs. Bretschneider? [130]

A. In his home on Blossom Street.

Q. Was anyone else present when you were there, please?

A. Yes, Mr. Grenier was there, and the nurse was there.

Q. And who? A. The nurse.

Q. Yes. Now, did you talk to Mr. Harley at that time, Mrs. Bretschneider? A. Yes, sir.

Q. Would you tell us what was said?

A. Well, I can't——

Q. What you said, what he said, or what Mr. Grenier said, if he was in your presence?

A. Well, the conversation was going on all the time I was there.

Mr. Grenier came up to the bank, and asked me to go down and notarize this deed at the time, so he took me down in his car.

We went in the house, in the back door, and we went into the dining room or lounge room, where Mr. Harley was.

Mr. Grenier introduced me to Mr. Harley, and said, "This is the lady from the bank," and said, "She will notarize your signature on the deed."

Q. And what did Mr. Harley say, if anything?

(Testimony of Eva Lee Bretschneider.)

A. I believe he said, "Good," but I am not sure.
[131] But he acknowledged it.

Q. Now, did he have the deed in his possession at the time that you were there?

A. Well, he didn't have it the exact moment that we went in. It was laying on a table, or some place in the room. He did have the deed in his possession at the time that he signed it.

Q. And do you know whether he read it?

A. Well, he looked at the deed, but I wouldn't say that he picked it up and read the entire legal description. I don't know, but he did look at it.

Q. And did he sign it in your presence?

A. Yes, he did.

Q. Did anybody assist him in signing it?

A. No.

Q. Now, you observed him at that time, of course, did you not, Mrs. Bretschneider?

A. I did.

Q. Now, in your opinion, did he appear rational or irrational?

A. He appeared rational, in my opinion.

Q. From your observation, did he have control of his mental faculties? A. Yes.

Mr. Young: Just a minute. I object to that and [132] move to strike the answer, and object to that question as calling for a conclusion of the witness.

The Court: She can say whether he appeared so to her, to have control. Is that your question?

Mr. Boshae: Yes, your Honor.

(Testimony of Eva Lee Bretschneider.)

The Court: Did he appear to you to be in possession of his mental faculties at that time?

The Witness: Yes, he did.

Q. (By Mr. Boshae): After he signed it, what did you do, Mrs. Bretschneider?

A. I took the deed from him, and went in the living room and sat on the couch and completed the notary. I signed the notary.

Q. Then what happened after that?

A. Mr. Grenier took me back to the bank.

Q. You were paid for your services, were you not?

A. Yes, I was.

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): You had not met Mr. Harley prior to the time you went to his house on May 16th?

A. No, sir.

Q. But you had seen him at the bank? [133]

A. Yes.

Q. Had you ever talked to him in the bank?

A. No, not prior to the time that I notarized the deed.

Q. And on the occasion, how many times did you see him in the bank prior to the time you acknowledged the deed?

A. One time prior to the time.

Q. And was he in his wheelchair at that time?

A. Yes, he was.

Q. How far away were you from him?

A. Oh, probably across the lobby. Probably from here to the first row.

(Testimony of Eva Lee Bretschneider.)

Q. That is as close as you got to him?

A. Yes, the first day.

Q. Yes. Then how did you determine from that distance that he was rational at that time?

A. Well, he didn't do anything irrational.

The Court: That distance would be how far, do you estimate, as indicated by the witness, gentlemen? 25 feet?

Mr. Young: 25 feet, yes, your Honor. Is that right?

Mr. Boshae: I don't know.

The Court: She says, as I understood her, from where she sits in the witness box to the first row inside the rail. Is that correct?

The Witness: Yes. [134]

The Court: To the bench just inside the rail. You gentlemen can estimate or measure how far that is.

How far would you estimate? 25 feet?

Mr. Young: Yes, I would, your Honor.

The Court: Mr. Boshae? From where the lady sits on the witness stand to the bar?

Mr. Boshae: I would say it is approximately that, your Honor.

I have now handed the clerk the list, your Honor.

The Court: Of the stipulated expenditures made by the defendant, reasonably and necessarily made by the defendant in the upkeep and maintenance of the property in question?

Mr. Boshae: That is correct.

The Court: Pursuant to the stipulation, it is re-

(Testimony of Eva Lee Bretschneider.)

ceived in evidence as Plaintiff's Exhibit 14, is it, Mr. Clerk?

Mr. Young: Defendant's, I guess it would be, your Honor.

The Court: Oh, no, not Plaintiff's Exhibit. I am sorry. Defendant's Exhibit D, is it not?

The Clerk: No, A, B, C, D, E and F are in evidence.

The Court: Oh, I am sorry. It would be G?

The Clerk: G in evidence.

The Court: What is the amount of those expenditures again?

The Clerk: There is no total on it. [135]

The Court: Didn't you total it?

Mr. Boshae: I have the total here, your Honor. It is \$1,498.93.

The Court: May I write that on Exhibit G, gentlemen?

Mr. Young: Yes, your Honor.

The Court: What is it again?

Mr. Boshae: \$1,498.93.

The Court: Very well.

(The list referred to was marked Defendant's Exhibit G and was received in evidence.)

The Court: Any further questions of this witness?

Mr. Young: Yes. I was waiting for your Honor. Shall I proceed?

The Court: Please.

Q. (By Mr. Young): Had you met Mr. Grenier prior to May 16th? A. No, sir.

(Testimony of Eva Lee Bretschneider.)

Q. Did you see him in the bank on the first occasion that you observed Mr. Harley?

A. Yes, sir.

Q. Mr. Grenier was with him? A. Yes, sir.

Q. Now, on the 16th of May is the occasion when you went to Mr. Harley's home with Mr. Grenier?

A. Yes, sir. [136]

Q. And Mr. Grenier came to the bank to get you; is that right? A. Yes.

Q. And you had never previously had any conversation with Mr. Grenier prior to May 16th?

A. No, sir.

Q. And on May 16th, what did he say to you?

A. He came in and asked me if I would go down and notarize this deed. I told him we did not usually go out and notarize deeds, make a notary, that that was just an accommodation for the customers that came in, and I would not be able to go unless some superior officer sent me.

Q. Did he tell you where he wanted you to go with him?

A. He said down on Blossom Street, within a few blocks.

Q. Did he mention Mr. Harley's name?

A. I don't recall.

Q. Did he show you the instrument he wanted you to acknowledge? A. No, sir.

Q. Then you went from the bank to Mr. Harley's home with Mr. Grenier? A. Yes.

Q. What time of day was it?

A. It was after lunch, and before 3:00 o'clock.

(Testimony of Eva Lee Bretschneider.)

Q. Then when you entered the house, where was Mr. Harley when you saw him?

A. He was sitting in a wheelchair in this dining room.

Q. Did Mr. Grenier introduce you to Mr. Harley? A. Yes, sir.

Q. Then did Mr. Grenier hand you the deed?

A. The deed was lying on some table, or something, and he picked it up and handed it to me, and I——

The Court: Who picked it up?

The Witness: Mr. Grenier.

Q. (By Mr. Young): And how far away was it from Mr. Harley where Mr. Grenier picked it up?

A. Oh, probably six feet.

The Court: Did he say anything to you? Did Mr. Grenier say anything to you?

The Witness: Well, we were talking about the deed, but——

The Court: In the presence of——

The Witness: In the presence of Mr. Harley, yes.

The Court: Did Mr. Harley say anything about it?

The Witness: They were talking, but I don't recall what was said. He seemed to know what was going on.

The Court: What did he say that led you to believe that he knew what was going on?

The Witness: When we went in, he said——

The Court: Who said, now? [138]

The Witness: Mr. Grenier said to Mr. Harley,

(Testimony of Eva Lee Bretschneider.)

he says, "Dan, this is Mrs. Bretschneider. She is the girl from the bank, and she will notarize your signature on the deed."

And Mr. Harley, the best I remember, his word was, "good."

Then they went on talking, but I didn't pay any attention to the conversation that was going on, but there was conversation going on.

Mr. Young: Do we have the original deposition in the courtroom of this witness?

The Clerk: Yes, we do.

Mr. Young: May we have it opened, your Honor, and filed?

The Court: The clerk will open it and file it, and mark it Plaintiff's Exhibit, for identification, next in order.

The Clerk: Plaintiff's Exhibit 14, for identification.

(The document referred to was marked Plaintiff's Exhibit 14 for identification.)

The Court: Do you wish it placed in front of the witness?

Mr. Young: Yes, if your Honor please.

The Court: Will you place it before the witness, Mr. Clerk, Exhibit 14, for identification?

The Clerk: Yes, your Honor.

(The exhibit referred to was placed before the witness.) [139]

Q. (By Mr. Young): I call your attention to page 4, line 1:

(Testimony of Eva Lee Bretschneider.)

“Q. And then when you reached the house what did he show you?”

Will you read that answer, please, before I interrogate you about it, just to yourself?

The Court: Have you read it?

The Witness: Yes, sir.

The Court: Your question.

Q. (By Mr. Young): I will read you your answer:

“A. He introduced me to Mr. Harley, and he showed me the deed. He picked the deed up and showed it to me, and then Mr. Harley was in a wheelchair, and there was a lady there at the time. And they put a board, I think, across his wheelchair, and he laid the deed down on the board and he asked for his pen, and he executed the deed.”

Did you so testify?

A. Yes, sir.

Q. I call your attention to page 7, lines 3, 4, 5 and 6. Will you read that reference, please?

A. Yes, sir.

The Court: Have you finished reading it?

The Witness: Yes, sir.

Q. (By Mr. Young): (Reading): [140]

“Q. Did he say anything to you when he signed it?

“A. No. I don’t recall. All the time I was there we were talking, but I don’t recall him saying anything particularly.”

Did you so testify?

A. Yes, sir.

(Testimony of Eva Lee Bretschneider.)

Mr. Young: May I see the deed, please?

The Court: Plaintiff's Exhibit 1?

Mr. Young: Yes, your Honor.

The Clerk: This is the original (handing document to counsel).

Mr. Young: Will you hand her the original, please, Mr. Clerk?

(The document referred to was handed to the witness.)

Q. (By Mr. Young): Is the deed that has just been presented to you the document that was signed by Mr. Harley, and which you acknowledged on May 16, 1955? A. Yes, sir.

Q. Was that document in the same condition at the time you acknowledged it, as it is now before you?

A. It has stamps on it that it didn't have at that time.

Q. It had no stamps on it at that time?

A. No, sir. It has been recorded. [141]

Q. You are quite certain there were no stamps on it?

A. No, there were no stamps on it.

Q. And you made that observation at that time?

A. Yes, sir.

Q. I call your attention to page 5 of your deposition, if you will refer, please, to that page, starting with line 1, down to line 12.

(The witness examined the document referred to.)

A. Yes, sir.

(Testimony of Eva Lee Bretschneider.)

Q. Are you through? A. Yes, sir.

Q. (Reading):

“Q. I show you what purports to be a photo-static copy of a warranty deed, and ask you whether or not you recognize that instrument as being the one you notarized on the occasion you have mentioned.

“A. Well, it looked like it.

“Q. Were there any stamps on it when you notarized it? “A. I don’t recall.

“Q. So far as the date of the deed is concerned, you have no recollection as to whether it was stamped, whether the Federal stamps which appear to be there were present at that time?

“A. No, I don’t have any recollection.” [142]

Did you so testify?

A. Yes, sir.

Q. Now, after you acknowledged the deed at Mr. Harley’s home, did you see him again later?

A. Yes, I saw him again.

Q. Where did you see him the next time?

A. Well, I am not sure. I think it was in the bank one time, in a wheelchair the next time, and another time I went out and notarized a deed for him,—not a deed, I notarized a power of attorney at the bank in a car, and——

Q. Did you finish?

A. I know I saw him a couple of times inside the bank, but I don’t know whether it was before or after I notarized the power of attorney.

(Testimony of Eva Lee Bretschneider.)

Q. Was Mr. Grenier with him on the occasions that you saw him in the bank after May 16th?

A. Yes, sir.

Q. On all the occasions, when you saw him?

A. Yes, sir, all the occasions.

Q. And on the occasion of the acknowledgment of a power of attorney, does your book that you have there show when that was?

A. Yes, sir. (Examining book.) It was on July 18, 1955.

Q. And what does your record indicate that you acknowledged? [143]

A. A power of attorney.

Q. To whom?

A. It was executed by Daniel L. Harley to Joseph H. Grenier.

Q. On that occasion did Mr. Harley come into the bank? A. No, sir.

Q. Who came into the bank?

A. Mr. Grenier came in the bank.

Q. And what did Mr. Grenier say to you?

A. He asked me if I could come out to the back door, to the car, and notarize an instrument for Mr. Harley.

Q. Did you say to Mr. Grenier to bring Mr. Harley into the bank? A. No, sir.

Q. Did Mr. Grenier tell you how it was that Mr. Harley didn't come into the bank?

A. No, sir.

Q. You went out to the automobile?

A. Yes, sir.

(Testimony of Eva Lee Bretschneider.)

Q. And that was in the rear of the bank, in the parking lot? A. Yes, sir.

Q. And you recognized Mr. Harley in the automobile? A. Yes, sir. [144]

Q. On that occasion did he sign this instrument? A. Yes, sir.

Q. Did you have any conversation with him?

A. Oh, I asked him how he was, and that was about all.

The Court: What instrument? When you refer to "this instrument," what do you mean?

Mr. Young: I mean the power of attorney, yes, your Honor. I beg your pardon.

The Court: Did you so understand?

The Witness: Yes, sir.

Q. (By Mr. Young): But you had no extended conversation?

A. No extended conversation.

Q. You didn't discuss the contents of the power of attorney with him? A. No, sir.

Q. Do you recall reading the power of attorney yourself? A. I glanced at it.

Q. All you did on that occasion was to pass the time of day with him; is that right?

A. Yes, sir.

Mr. Young: That is all, your Honor.

Mr. Boshae: I have just one more question. [145]

Redirect Examination

Q. (By Mr. Boshae): Mrs. Bretschneider, at the time that you notarized the power of attorney,

(Testimony of Eva Lee Bretschneider.)

did you observe Mr. Harley's demeanor and conduct, and his condition at that time?

A. Well, as far as I was concerned, he looked all right, and he was acting rational.

Q. He appeared rational? A. Yes.

Q. Did he appear as though he had control of his mental faculties? A. Yes, he did.

Mr. Boshae: I have no further questions.

Mr. Young: That is all, your Honor.

Mr. Boshae: You may step down.

The Court: Step down.

Mr. Boshae: Thank you very much, Mrs. Bretschneider.

May this witness be excused, your Honor?

Mr. Young: Yes, your Honor, so far as I am concerned.

The Court: She may.

(Witness excused.)

The Court: Your next witness.

Mr. Boshae: Mr. Whitworth, please. [146]

WALTON N. WHITWORTH

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Walton N. Whitworth.

The Clerk: Is that Whitworth?

The Witness: Whitworth, W-h-i-t-w-o-r-t-h.

Direct Examination

Q. (By Mr. Boshae): Mr. Whitworth, have you know the deceased, Daniel L. Harley?

(Testimony of Walton N. Whitworth.)

A. Yes.

Q. How long have you known him, Mr. Whitworth?

A. Oh, I would say a period of at least 30 years.

Q. And you knew Mr. Grenier? A. Yes.

Q. Did you ever have occasion to visit Mr. Harley during the year 1955?

A. Yes, quite often.

Q. Would you tell the court approximately how often you saw or visited Mr. Harley?

A. Well, prior to Mrs. Harley's death, I would say that we saw him on the average of every three or four weeks. Following Mrs. Harley's death, I would say approximately every two weeks. [147]

Q. Did you engage in any conversations with him, Mr. Whitworth?

A. Yes, in the course of a visit, just as one would in visiting with a sick friend.

Q. Was there any conversation in particular that you recall, or just general conversation?

A. Primarily, general conversation.

Q. Was there anyone ever present when you were there? A. Oh, yes.

Q. Besides Mr. Harley?

A. Yes, Mrs. Studebaker was. As I recall it, she was always there. On, oh, at least three occasions, the attorney who—Mr.—

Q. Mr. Edgar?

A. Mr. Edgar was present, and I think on about —on I think probably three occasions Jimmy Harley was there.

(Testimony of Walton N. Whitworth.)

Q. Did you have occasion to observe Mr. Harley in visiting and talking with him?

A. Oh, yes.

Q. Do you have an opinion as to his mental sanity? A. Well,—

Q. You can just answer that "Yes" or "No."

A. Yes.

Q. Can you tell the court, in your opinion, whether he was mentally sane or insane? [148]

A. In my opinion, he was always sane whenever I saw him.

Q. In your observation, did he appear rational or irrational? A. Rational.

Q. And did he have control of his mental faculties on all of these occasions?

A. As near as I could determine.

Q. In your opinion? A. Yes.

Q. Did he at any time during these visits that you made with Mr. Harley appear irrational?

A. No.

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): Mr. Whitworth, did you know Mr. Harley in Montana? A. Yes.

Q. How long ago was that prior to the time he died?

A. Oh, approximately 30 years.

Q. And after he came to California, did you see him frequently? A. Yes.

Q. When did he come to California? [149]

(Testimony of Walton N. Whitworth.)

A. I am not exactly sure. I think approximately in '47 or '48, along in there somewhere.

Q. Did you know Mrs. Harley also?

A. Very well.

Q. And your family and the Harley family visited back and forth, did you?

A. My immediate family, yes.

Q. Is that right? A. Yes.

Q. Now, during the year 1955, when would you say is the first occasion that you had any conversation with Mr. Harley?

A. Well, it would be early in the year. As far as an exact date is concerned, I don't know that.

Q. And where did you see him?

A. In his home.

Q. And was Mrs. Harley there? A. Yes.

Q. Did he appear to be well when you saw him in the early part of the year 1955?

A. That is a matter of degree, I presume.

Q. Well, whatever the——

A. If you want to consider me well, in good health, I would say no.

Q. Now, explain what his appearance was in that answer. [150] How did he appear to you, when you saw him in the early part of the year 1955?

The Court: You are referring to his physical aspects now?

Mr. Young: Yes, physical aspects.

The Witness: Well, I would say they were reasonably good.

(Testimony of Walton N. Whitworth.)

Q. (By Mr. Young): Do you know how much he weighed?

A. Well, we used to often kid about that, because of my wife being very slender. I used to wonder which was the heavier, Dan or my wife. He had been slight for a good many years, very slight.

Q. Did he tell you he had been sick with pneumonia during the early part of the year 1955?

A. I don't recall that.

Q. Did he tell you that he had been in the hospital in November of 1954?

A. I am very poor on dates. The only time I recall his being in the hospital is when he had an operation in Burbank in St. Joseph's Hospital.

Q. Did you go to see him when he was in the hospital? A. Yes.

Q. When was that?

A. I think that was considerably earlier. I believe that must have been in 1940—I would rather not venture a guess. [151]

Q. Did he tell you, when you saw him in 1955, in the early part of 1955, that he was suffering from heart trouble?

A. No, I don't recall that he did.

Q. Did he tell you he was having difficulty with his respiratory system, his breathing?

A. Not at that particular time.

Q. Did he tell you in the early part of 1955 that his doctor had told him that he was suffering from arteriosclerosis? A. No, he didn't.

(Testimony of Walton N. Whitworth.)

Q. Well, did he at any time during the year 1955 tell you that he was suffering from heart trouble?

A. Not that I recall.

Q. Were you in Los Angeles or Glendale when Mrs. Harley passed away? A. Yes.

Q. In March?

A. I was in North Hollywood.

Q. Did you visit Mr. Harley around the time that she passed away?

A. Yes, I believe we were in his home the night she passed away.

Q. And on that occasion did he say anything to you with reference to his health? [152]

A. As far as that particular occasion is concerned, I wouldn't say.

Q. Well, on that occasion when you were there, did you make an observation as to his physical being?

A. Well, Dan had gone downhill to some extent, I think, over that period.

Q. That is, from the early part of 1955, that you refer to?

A. From the time that Mrs. Harley was the most ill.

Q. That was the early part of 1955?

A. That's correct.

Q. What do you mean when you say that he had gone downhill?

A. Well, he had, of course, been under a terrific emotional strain because of her illness, and I think it appeared that he had probably lost some weight.

(Testimony of Walton N. Whitworth.)

Q. What observation did you make on that occasion about his alertness?

A. In my opinion, Dan was always very alert.

Q. On the occasion we are referring to, when you were there after Mrs. Harley died?

A. Yes.

Q. Did you ever discuss any of his business affairs with him? A. No. [153]

Q. What would be the general topic of your conversation?

A. Well, primarily, old times. We went over there, of course, with the main idea of trying to cheer Dan up, and relieve some of this strain he was under, and so forth, and he loved to reminisce about the old times in Montana, and the people we both knew, and conversations of that nature.

We discussed frequently the goings-on we read about in the home town newspapers, to which we both subscribed, and things of that nature.

I never delved into Dan's personal affairs. I thought it was none of my business, and if he wanted to give me that information, he would volunteer it.

Q. He never said anything to you about his personal affairs? A. That's right.

Q. Do you know Mr. Grenier?

A. Very well.

Q. And Mr. Harley never told you that he had deeded some property in Montana to Mr. Grenier,—— A. No.

Q. ——on any of these occasions you visited

(Testimony of Walton N. Whitworth.)

with him? A. No.

Q. By the way, you were named as executor in the will of July 28, 1955, weren't you? [154]

A. Yes.

Q. And you declined to act?

A. That's right.

Q. Is that right? A. That's right.

Q. After Mrs. Harley passed away, Mr. Harley appeared to you to be quite depressed, didn't he?

A. Certainly, to the extent that anyone might expect a husband to be, yes.

Q. And that is one of the reasons you went to call on him, because he appeared to you to be depressed?

A. We expected him to be depressed.

Q. And when you refer to his being depressed, you mean he was depressed mentally; isn't that right?

A. No, I mean by being depressed, depressed emotionally.

Q. Well, how did he react when you were there that gave you that impression?

A. He was naturally upset, as anyone would be who loved a wife who had passed away.

Q. And in these conversations you had with him after his wife passed away, you concluded that he was a heartbroken man over the loss of his wife, didn't you?

A. I felt that he was deeply — felt the loss deeply.

Q. And he told you, did he not, on several [155]

(Testimony of Walton N. Whitworth.)

occasions after his wife passed away, that he wanted to die himself?

A. No, he didn't state that.

Q. He never told you that. After his wife passed away, on these visits you made to his home, where would he be when you entered the home?

A. Usually on the davenport in the living room.

Q. Did you ever see him in bed?

A. Once.

Q. Just once. When was that?

A. I believe it was the next to the last visit.

Q. When was the next to the last visit?

A. Well, the last visit was approximately about the 19th of July. The one prior to that was probably about two weeks prior.

Q. You never saw him in bed except one time?

A. That's all that I recall.

Q. How many times did you see him in his wheelchair?

A. I don't recall seeing him in his wheelchair.

Q. He was usually lying on the couch?

A. Right.

The Court: Was he clothed?

The Witness: In his pajamas and robe.

Q. (By Mr. Young): After his wife passed away, on these visits that you made, did you ever see him dressed in his clothes? [156]

A. I believe so.

Q. When?

A. I would venture the opinion that he was

(Testimony of Walton N. Whitworth.)

dressed on two or three occasions within the first month or two after his wife died.

Q. Did you know or meet Mrs. Studebaker, the nurse? A. Yes.

Q. Now, this condition, that he was grieved over the loss of his wife, that continued down to the last time you saw him, did it?

A. I don't recall that he expressed it particularly.

Q. Did he tell you on any of these occasions after his wife passed away, that he was going to marry the nurse? A. No.

Q. He didn't say that to you?

A. No, not that I recall.

Mr. Young: He never—I withdraw that. That is all.

Mr. Boshae: No further questions.

The Court: You may step down, Mr. Whitworth.

(Witness excused.)

The Court: The next witness.

Mr. Boshae: Mr. Miller. [157]

WILLIAM L. MILLER

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: William L. Miller.

The Clerk: Be seated, please, Mr. Miller.

Mr. Boshae: If the court please, may Mr. Whitworth be excused?

Mr. Young: Yes, your Honor.

The Court: He may.

Direct Examination

Q. (By Mr. Boshae): Mr. Miller, what is your business or occupation? A. At present?

Q. At present. Let's refer to the year 1955.

A. I was in the sick room supply business.

Q. Did you know an individual by the name of Daniel L. Harley? A. I did.

Q. And also a Mr. Grenier? A. Yes, sir.

Q. When did you first see Mr. Harley, Mr. Miller, during the year 1955?

A. I was called to take oxygen to his residence. If I recall correctly, it was about the middle of April, of 1955. [158]

Q. And how often did you go there after the first time that you visited his home?

A. I serviced him with oxygen, I would say, roughly, about three times a week on an average.

Q. Did you have occasion at the time you would see him to talk to him, Mr. Miller?

A. Quite frequently.

(Testimony of William L. Miller.)

Q. Could you tell the court what the nature of your conversation would be when you would see him?

A. Usually general topics. Quite frequently he would be interested in the particular machine that he was using; some magazine article; things in general.

Q. Did you have occasion during these visits to observe his conduct, and the way he acted?

A. Yes, I did.

Q. Now, did he appear to you to be rational or irrational during these visits?

A. To me he appeared to be completely rational.

Q. And did he appear to you to be in control of his mental faculties?

A. As far as I can recall, on every occasion.

Q. And so far as you can recall, did he appear to you that he could see?

A. I am not an optometrist, but as a lay person I was [159] amazed at his facilities so far as sight was concerned.

Q. Did he recognize you whenever you went there? A. Even across the room.

Q. And when was the last time that you saw him, Mr. Miller?

A. A few hours before he died.

Q. Before he passed away?

A. That's right.

Q. How was he attired when you would see him during these visits?

A. Sometimes he would be in his own room, at-

(Testimony of William L. Miller.)

tired in his pajamas. Sometimes he would be in the living room, and attired in his robe. I would call at various times. It would vary. The hour of the day would vary when I would be there.

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): Mr. Miller, you were connected with the Alert Ambulance Company?

A. I was the Alert Ambulance Company.

Q. You were the Alert Ambulance Company?

A. Yes, sir.

Q. And what did you do for Mr. Harley, insofar as your [160] company was concerned?

A. We supplied him with oxygen.

Q. Do you have any records with you to show how much oxygen you supplied him with?

A. No, I do not.

Q. Who told you to supply him with oxygen?

A. I think he had been getting oxygen from some other company. I don't recall at present which company. There was something in connection with a failure in service, and I was called.

Q. Who called you? The doctor?

A. I was called by the nurse.

Q. By Mrs. Studebaker? A. Yes.

Q. Did the doctor give you any orders as to how much oxygen to send over to Mr. Harley?

A. The doctor gave orders as to the quantity of oxygen he was to use.

Q. What do you mean by "quantity"?

(Testimony of William L. Miller.)

A. Whenever he would take the oxygen, how much he was to take at that particular time.

Q. Did the doctor tell you that?

A. He left orders to that effect.

Q. You didn't give him the oxygen yourself, did you?

A. Do you mean, did I administer the oxygen to him? [161]

Q. Yes. Did you set the gauge on the oxygen?

A. The gauge was set by the doctor, as far as I know.

Q. By the doctor. Do you know Dr. Ogden?

A. Only by reputation.

Q. Have you talked to him in the home of Mr. Harley? A. Not that I recall.

Q. What was Mr. Harley doing with this oxygen?

A. Would you restate the question?

The Court: He was breathing it, wasn't he?

The Witness: Yes.

The Court: When were you called there?

The Witness: You mean the first time?

The Court: Yes.

The Witness: It was in the middle of April sometime.

The Court: And you say you serviced him two or three times a week?

The Witness: Something like that.

The Court: Would you be able to estimate from the quantity of oxygen you took there, how long a period of time it would take him to consume it?

(Testimony of William L. Miller.)

The Witness: This is rather a medical problem, your Honor.

The Court: Did he have a tent there, an oxygen tent?

The Witness: No, he did not.

The Court: He took it with a mask, did he?

The Witness: He took it with what is known as a Bennett Positive Pressure breathing machine.

The Court: Now, you say you served him two or three times a week. Would you be able to estimate how long he would breathe that oxygen before he used it all up? How many hours or days?

The Witness: Well, if I can express it, it is like anticipating how much water you would use in a given month. It is a little bit hard to tell. Sometimes you take it at a greater rate, sometimes at a reduced rate.

The Court: I am assuming, and I suppose you have some idea of the rate at which he was using it, and you have some idea of what you gave him, and I thought by an arithmetical process you would be able to estimate, say, how many hours a day he spent consuming that oxygen, or how many minutes, or whatever it was.

The Witness: Well, usually, they spend about a half an hour, 20 minutes to half an hour four to five times a day with the treatment of the machine. Then they can take oxygen intermittently, as required between these particular treatments.

The Court: Whenever they feel the need of it?

The Witness: Whenever they feel the need of it.

(Testimony of William L. Miller.)

And if I recall correctly, I would have records to show, I would take an average of two tanks a trip, or such a matter. [163] Sometimes it would be three.

The Court: Would you say that indicated a frequent use or an infrequent use?

The Witness: Well, anyone who requires a Bennett Positive Pressure breathing machine does use oxygen much more frequently than the average person who uses it through a mask. That is because it takes oxygen to flush the machine. If you understand the principle of the old hydraulic ram, it takes oxygen to operate the machine, as well as to supply it to the person.

The Court: That machine, is that used in more serious cases or less serious cases than a tent?

The Witness: Well, this again is a medical thing, and——

The Court: Well, perhaps you are not qualified to answer.

The Witness: As I say, I only supply the oxygen. A tent is used usually for a different type of complaint.

Q. (By Mr. Young): On April the 9th is when you took the first oxygen to Mr. Harley, is that right?

A. If I recall correctly. My records would show it.

Q. Do you have records showing all these deliveries?

A. Yes.

(Testimony of William L. Miller.)

Q. How much did a tank of oxygen cost? What did you bill him for it?

A. Oh, I didn't look that up. I gave him a rate on so many tanks. [164]

Q. Isn't it a fact that from April the 9th to May 17th you billed him for \$82.97 worth of oxygen?

A. From when?

Q. From April 9th, the first time you delivered oxygen to him, to May 17th, \$82.97?

A. I would have to consult my records. I don't recall.

Q. Did you deliver oxygen to him on April 9th?

A. If I recall correctly.

Q. And April 14th?

The Court: He said about three times a week.

Q. (By Mr. Young): Isn't it a fact that from June 2nd to July 20th you delivered oxygen to him amounting to \$347.76?

A. If you need the exact amounts, I can supply them. It would take me a while to do that.

Q. Isn't it a fact that on July 2nd you delivered oxygen to him?

The Court: He said about three times a week. Isn't that close enough?

Mr. Young: Well, I guess so. Sometimes you have got it here every day, or every other day, but that is all right.

Q. Were you in Mr. Harley's home on the 28th of July, 1955?

A. I was. [165]

Q. Did you have a conversation with him that day?

A. Yes.

(Testimony of William L. Miller.)

Q. Where was he when you had that conversation? A. He was in the front room.

Q. Was he lying down or sitting in his wheelchair?

A. He was sitting on the davenport.

Q. Who else was there?

A. Well, his nurse was in constant attendance, and somebody had come to visit him that day. I think—let's see—was that on a Thursday?

Q. The 28th, yes, was on a Thursday.

A. Yes, I was there.

Q. You delivered oxygen that day?

A. Yes.

Q. You witnessed a will on that day, didn't you?

A. Does this have any bearing on this?

The Court: Just answer the question, Mr. Miller. Did you witness a will on that day?

The Witness: Yes.

Q. (By Mr. Young): This machine that you have referred to, this oxygen machine, did Mr. Grenier give that to you? A. No.

Q. Who did?

A. Nobody gave it to me. It is in my possession at present because there are a few things that would have been [166] necessary to have put it in the hands of anybody else, so he told me—Mr. Grenier told me to take care of it until I was ordered to do anything else with it.

Q. How much did you charge for that machine?

A. I charged nothing.

(Testimony of William L. Miller.)

Q. To Mr. Harley?

A. I didn't charge him anything.

Q. You didn't sell it to him? A. No, sir.

Q. Where did he get it? A. I don't know.

Q. What is the machine worth? A. Today?

Mr. Boshae: Your Honor, I am going to object to that as being incompetent, irrelevant and immaterial, as to what the machine is worth.

The Court: Overruled. Can you give us an estimate?

The Witness: Of the worth of the machine?

The Court: Yes, the reasonable value, the market value.

The Witness: New, or in the condition it is in?

The Court: As it is.

The Witness: I would say about \$85.

Q. (By Mr. Young): And when was it turned over to you?

A. I don't recall. It was some time after his demise.

Q. Mr. Grenier gave it to you, or told you to take it? [167]

A. Well, he told me to take care of it. I did say I would.

Q. And you have been taking care of it ever since? A. Yes.

Q. You haven't turned it over to the administrator of Mr. Harley's estate? A. No, sir.

Q. Do you still have it in your possession?

A. Yes, sir.

Q. You didn't sell it? A. No, sir.

(Testimony of William L. Miller.)

Q. Have you leased it out? A. No, sir.

Q. Have you been paid any money after Mr. Harley's death in connection with any of your statements by Mr. Grenier?

A. I think one of the checks that was supposed to clear the bank did not clear because of his demise, before the check got to the bank, and I think that was——

Q. What happened? Did Mr. Grenier give you some money?

A. I think that check was re-covered.

Q. Was what? A. Re-covered.

The Court: You mean by that, Mr. Grenier made it good? [168]

The Witness: It was made good by the estate.

Q. (By Mr. Young): Made good by whom?

A. Well, I suppose it was by his estate.

Q. Well, do you know whether it was made good by the estate, or whether Mr. Grenier paid it?

A. I don't recall.

Q. Whose check did Mr. Grenier give you,—his, when he paid it?

The Witness: Your Honor, this is over a year ago. I don't remember.

The Court: If you don't remember, just say so.

The Witness: I don't remember.

Q. (By Mr. Young): How much was the amount of the check?

A. I would have to look at my records.

The Court: About how much? Have you any idea?

(Testimony of William L. Miller.)

The Witness: I think probably between \$75 and \$100.

The Court: Between \$75 and \$100. Anything further from this witness?

The Witness: It covered some of the oxygen.

Q. (By Mr. Young): Between \$75 and \$100?

A. Something in there. I don't remember exactly. I can't tell you. I could tell you exactly if you would let me look at my records.

Mr. Young: Fine. Then if you will do that, I would appreciate it. [169]

The Court: Let's not have the witness come back, unless it helps you. It doesn't help me.

Mr. Young: All right.

The Witness: It might vary \$50, or it might vary \$25.

Mr. Young: Very well. That is all.

The Court: Anything further of this witness?

Mr. Boshae: I have just one matter. I didn't quite follow the question, your Honor. I think Mr. Young asked him if he was given any money for the statements.

Were you referring to the statements for his services, or for his testimony?

Mr. Young: That is a matter of inference or deduction, as to what he was given the money for.

The Court: The witness answered that a check that was given by the decedent, I assume, or was it given you by Mr. Harley before his death?

The Witness: The check was for oxygen which

(Testimony of William L. Miller.)

he received before his death, and then by the time it was to clear the bank, they stopped payment.

Redirect Examination

Q. (By Mr. Boshae): Were you ever given any money for testifying? A. No sir, never. [170]

Mr. Boshae: That is what I wanted to clear up. No further questions.

The Court: You may step down. Is there any occasion to require the further attendance of Mr. Miller?

Mr. Young: Not from me, your Honor.

Mr. Boshae: No, your Honor.

The Court: You are excused.

(Witness excused.)

The Court: Your next witness.

Mr. Boshae: Mrs. Gordon.

JESSIE B. GORDON

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Jessie B. Gordon.

The Clerk: Be seated, please.

Direct Examination

Q. (By Mr. Boshae): Mrs. Gordon, have you ever known a gentleman by the name of Daniel L. Harley? A. Yes.

Q. Did you know him during the year 1955?

A. Yes, I did.

(Testimony of Jessie B. Gordon.)

Q. How long had you known him prior to that time?

A. Thirty-odd years, more or less. [171]

Q. Did you know him in Montana?

A. That's right.

Q. Now, how often did you have occasion to see him during 1955, Mrs. Gordon?

A. Approximately every — once every three weeks.

Q. Were you related to him in any way?

A. No.

Q. You also know Mr. Grenier; is that right?

A. That's right.

Q. Where did you first become acquainted with Mr. Harley?

A. In Montana; Deer Lodge, Montana.

Q. I don't know whether I got your answer or not, but how often did you have occasion to see Mr. Harley during 1955?

A. Approximately once in every three weeks.

Q. During that time did you talk to him?

A. Oh, certainly, yes.

Q. You would visit him at his home, is that correct?

A. That's right.

Q. On the occasions when you would go there, where would he be, Mrs. Gordon?

A. Shortly after Mrs. Harley died, when I came in he was sitting at his desk fully clothed, writing out checks and attending to business. That was on one occasion I [172] remember, and another occasion I recall he came from the bedroom, walked out

(Testimony of Jessie B. Gordon.)

from the bedroom. And on two or three occasions he was sitting on the davenport in the living room.

Q. Now, are you able to form an opinion as to his mental sanity, Mrs. Gordon?

A. I certainly am.

Q. Would you say that he was mentally sane or insane?

A. Very sane.

Q. And did he appear to you to be rational or irrational?

A. Rational.

Q. Did he appear to have control of his mental faculties?

A. Very much.

Q. Could he talk clearly?

A. Very much so, very clearly.

Q. And was there anything in your observation of Mr. Harley that would cause you to feel that he couldn't see?

A. None; nothing.

Q. What would be your general discussion, Mrs. Gordon, if you can recall, when you would see him?

A. Of course, Dan was very fond of Montana, and we usually recalled instances in Montana, and he was always interested in my mother, how her health was, and what my husband was doing. It was just general conversation. [173]

Q. Did he ever speak to you about conveying any property in Montana?

A. No, no.

Q. And how late—at what time prior to his death—when was the last time you saw him?

A. Mother and I both visited him, it was either a Tuesday or Wednesday before he died on Saturday. It was one of those days.

Q. You saw him at that time?

(Testimony of Jessie B. Gordon.)

A. That's right. Mother and I visited him.

Q. Other than his general physical condition, did he appear rational or irrational at that time?

A. Rational.

Q. Did you talk to him then?

A. Yes. Mother and I discussed how unusually sharp he was that night. Mother hadn't seen him, because she is aged.

Mr. Young: I move to strike that answer, what she and her mother discussed.

The Court: Motion granted.

Q. (By Mr. Boshae): Did you speak to each other in front of Mr. Harley, or was this outside of his presence?

A. Outside of his presence, naturally.

Mr. Boshae: You may cross examine. [174]

Cross Examination

Q. (By Mr. Young): You are acquainted with Mr. Grenier, too, I take it, Mrs. Gordon?

A. Mr. Grenier?

Q. Yes. A. Yes.

Q. Are you related to him?

A. Not at all.

Q. Did you know him in Montana?

A. I did.

Q. Was he ever present when you were visiting Mr. Harley's house? A. Yes.

Q. On how many occasions when you were there was he present? A. I would say three.

(Testimony of Jessie B. Gordon.)

Q. Did you see Mr. Harley on May 16, 1955?

A. I don't know.

Q. Did Mr. Harley ever tell you he had given any property to Mr. Grenier? A. No.

Q. Ever tell you he had deeded any property to Mr. Grenier? A. No. [175]

Q. Did he ever discuss any of his business affairs with you at any time? A. No.

Q. Your meetings and conversations were purely social; is that right? A. Yes, sir.

Q. Did he tell you that he was going to marry his nurse, Mrs. Studebaker? A. No.

Q. Did she ever tell you that she was going to marry him? A. Yes.

Q. She told you that, didn't she? A. Yes.

Q. Did you talk to Mr. Harley about it?

A. Mr. who?

Q. Mr. Harley? A. No.

Q. After Mrs. Studebaker told you she was going to marry him, did you say anything to Mr. Harley about it?

A. I didn't know about it until after Mr. Harley died.

Q. This was after he passed away?

A. That's right.

Mr. Young: That is all.

Mr. Boshae: No further questions.

The Court: You may step down, Mrs. Gordon.

Mr. Boshae: May this witness be excused?

The Court: She may. You are excused.

(Witness excused.)

The Court: Your next witness.

Mr. Boshae: I will call Mrs. MacMartin, please.

PEGGY MacMARTIN

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: My name is Peggy MacMartin.

The Clerk: Peggy what?

The Witness: MacMartin.

The Clerk: MacMartin. Is that M-c-M-a-r-t-i-n?

The Witness: M-a-c-M-a-r-t-i-n.

Direct Examination

Q. (By Mr. Boshae): Mrs. MacMartin, what is your business or occupation?

A. I am a nurse.

Q. Did you have occasion to attend Mr. Harley during 1955, Daniel L. Harley? A. Yes, I did.

Q. And also to his wife, Mrs. Tess Harley, prior to her death? [177] A. Yes.

Q. Now, when were you attending them, or were you at that home, Mrs. MacMartin?

A. I was first called to the home the day that Mrs. Harley died. I was called in at 7:00 o'clock in the morning, to relieve Mrs. Studebaker.

Q. I see. Was Mr. Harley there?

A. Yes, he was.

Q. Have you ever seen Jim Harley, his nephew?

A. At that time, no.

(Testimony of Peggy MacMartin.)

Q. Now, how long did you remain in attendance there, Mrs. MacMartin?

A. About four days, I believe.

Q. Did you ever go back there again after the four-day period?

A. Oh, yes, I used to go back to visit Mrs. Studebaker, who was a friend of mine.

Q. I see. On those occasions when you would go to visit Mrs. Studebaker, would you see Mr. Harley?

A. Yes, he was always there.

Q. All right. Now, how often would you say you went to see Mrs. Studebaker, you went to the home of Daniel L. Harley?

A. Oh, perhaps six times between the time his wife died and when Mr. Harley died. [178]

Q. When you would go to Mr. Harley's home, did you ever talk to Mr. Harley?

A. Oh, I always did. Mr. Harley would come to the door, and would usually invite me in, and if Mrs. Studebaker was busy, I would sit down and talk with him, and pass the time of day, and we would have a little conversation before Mrs. Studebaker was available.

Q. Do you recall any particular conversation that you had with Mr. Harley?

A. No, not any particular one. We used to just have a general social conversation, where we would talk about current things. He was a very interesting person and very cheerful.

Q. When was the last time that you saw him, Mrs. MacMartin?

(Testimony of Peggy MacMartin.)

A. I was with Mr. Harley the morning that he died.

Q. You were with him? A. Yes, I was.

Q. Now, have you ever seen him read a newspaper?

A. Oh, yes. He always was sitting on the couch there, and by the window, and had his newspapers and his books around him. He read quite a bit.

Q. Did you ever discuss any of the matters that——

A. Yes. Yes, I did.

Q. Now, were you able to form an opinion, [179] Mrs. MacMartin, as to whether or not he appeared to you to be rational or irrational?

A. He appeared to me to be very rational.

Q. Did he appear to you to have control of his mode of speech, and his mental faculties?

A. Yes. He talked quite a bit, and everything he said made sense, in other words.

Q. Did he appear that way the last time you saw him?

A. No. I was called in the night before Mr. Harley died, and at that time he did not know me.

Q. Did he ever discuss his business affairs with you?

A. No, I don't ever remember him discussing his business affairs with me.

Q. Just general conversation.

A. Just general conversation.

Q. Do you know whether or not he could walk?

A. Oh, yes. Of course, he used to walk to the

(Testimony of Peggy MacMartin.)

table. I have had lunch a time or two there with Mrs. Studebaker and Mr. Harley, and he walked to the table.

Q. How late can you recall that he was walking during the times that you were visiting there?

A. The end of July there, a day or two before he died.

Mr. Boshae: You may cross examine. [180]

Cross Examination

Q. (By Mr. Young): Mrs. MacMartin, you were called to Mr. Harley's home on March 20th?

Mr. Boshae: Excuse me, Mr. Young. Your Honor, the clerk, the deputy clerk of the Superior Court wanted to be excused, and I didn't know. So far as I am concerned, he may be excused.

Mr. Young: That is all right.

The Court: Have you gentlemen been keeping him here all this time?

Mr. Young: Well, your Honor, it is still probably necessary to refer to this file with this witness, unless counsel will stipulate that this witness was a witness to the will of July 28th.

Mr. Boshae: Who was?

Mr. Young: Mrs. MacMartin.

Mr. Boshae: Ask her, counsel.

Q. (By Mr. Young): Did you witness a will in the home of Mr. Harley on the 28th of July?

A. Yes, I did.

Q. And you were there that day visiting Mrs. Studebaker?

A. Yes.

(Testimony of Peggy MacMartin.)

Mr. Young: You may have the file, so far as I am concerned. [181]

The Court: Then the witness from the court is excused.

Q. (By Mr. Young): Mrs. Studebaker is the one that sent for you to come to the Harley home, didn't she?

A. No, she didn't send for me. I used to go visit Mrs. Studebaker whenever I had occasion to be in Burbank or Glendale. I dropped in to see them. Most of the time Mrs. Studebaker didn't know when I was coming.

Q. I am referring to the time when you went to Mr. Harley's home professionally, and you were there four days, as I understand your testimony, as a nurse.

A. That was when Mrs. Harley died.

Q. Yes. Who sent for you on that occasion?

A. Mrs. Studebaker said that she had been authorized by the doctor to call another nurse, and she called me.

Q. During the four days you were there, Mr. Harley had a stroke, didn't he?

A. Not that I recall.

Q. Not that you recall. Are you sure about that?

A. I am sure about it. I don't remember.

Q. Isn't it a fact that while you were there, in fact, on March the 22nd, he had a stroke and fell to the floor?

A. I don't remember.

Q. Do you remember picking him up off the floor during the four days you were there?

(Testimony of Peggy MacMartin.)

A. No, I don't. It has been a long time ago.

Q. Yes. Do you know where Mrs. Studebaker is now?

A. The last I heard of Mrs. Studebaker, she was in Bakersfield.

Q. Now, after the four days that you were there, when was the next time that you saw Mr. Harley?

A. Oh, I dropped in—not professionally, but I dropped in to see Mrs. Studebaker probably in another week or two. I don't remember the exact date.

Q. Did you ever discuss with Mrs. Studebaker Mr. Harley's condition, physical condition?

A. We did at the last, the last night I was there.

Q. That is the night before he died?

A. Yes.

Q. He was unconscious then, when you saw him?

A. Yes.

Q. Isn't it a fact that Mrs. Studebaker told you that Mr. Harley had not been out of his wheelchair for a period of two months before he died?

A. No. Mrs. Studebaker——

Mr. Boshae: I object to that, your Honor, as calling for hearsay, unless the deceased was there or Mr. Grenier was present.

The Court: She said "No." Do you want the answer stricken?

Mr. Boshae: No. [183]

The Witness: I don't remember seeing Mr. Harley in a wheelchair.

(Testimony of Peggy MacMartin.)

Q. (By Mr. Young): At any time?

A. At any time.

Q. That was during the entire period from the time you went there on March 20th until he died, when you saw him?

A. Yes. I don't remember.

Q. You never saw him in a wheelchair at all?

A. He was always sitting on the couch over there by the window.

Q. And you observed him during that period walking around himself? A. Yes.

Q. When was the last time you observed Mr. Harley walking?

A. I think the last day I was there before I was called in at the time of his death.

The Court: How long was that before his death?

The Witness: About two days.

The Court: Anything further?

Mr. Young: No, that is all.

Mr. Boshae: I have nothing further.

The Court: You may step down, and you are excused, Mrs. MacMartin.

(Witness excused). [184]

The Court: Your next witness.

Mr. Boshae: Mr. Jack Jenkins.

JACK R. JENKINS

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Jack R. Jenkins.

The Clerk: Be seated, please, Mr. Jenkins.

Direct Examination

Q. (By Mr. Boshae): Mr. Jenkins, did you know Mr. Daniel L. Harley, the deceased?

A. I did, yes.

Q. How long had you known him prior to his death?

A. Oh, 40, 45 years.

Q. Did you also know Mr. Grenier?

A. Yes, I did.

Q. Where did you first become acquainted with him, Mr. Jenkins?

A. Butte, Montana.

Q. From the time that Mr. Harley came from Montana to California, how often did you have occasion to see Mr. Harley, Mr. Daniel Harley?

A. Well, it wasn't too frequently up until the [185] time Mrs. Harley got real sick, and then we visited him quite often.

Q. How often would you say was quite often, approximately?

A. Well, sometimes once a week, and maybe once every three weeks. I was working Sundays at that time, and working considerable overtime, and sometimes I would be off, and sometimes I wouldn't.

Q. Did you at the time you would visit Mr. Harley have occasion to observe his conduct and his method of speaking?

A. Yes, I did.

(Testimony of Jack R. Jenkins.)

Q. Could you tell the court from your observation whether he could see? A. Yes.

Q. When was the last day you saw him, Mr. Jenkins?

A. Well, it was—I didn't see Dan after the 1st of July.

Q. You didn't see him after the 1st?

A. No.

Q. All right. Then prior to the 1st of July, did you form an opinion as to his mental sanity?

A. Yes.

Q. You can just answer that "Yes" or "No."

A. Yes.

Q. Could you tell the court whether or not, in your opinion, he was mentally sane or insane? [186]

A. I would say he was sane.

Q. And, Mr. Jenkins, what would you talk about when you would see Mr. Harley?

A. Well, just reminiscing old times around Butte, and just things in general, like some magazine article, or some other thing like that, baseball, a little baseball.

Q. And how was he dressed when you would go to visit him?

A. Well, he was dressed, yes.

Q. Did he have his clothes on, or did he have a robe or pajamas, or just what did he have?

A. No, he would generally have his pants on, and a jacket.

Q. And where would he be when you would go in there?

(Testimony of Jack R. Jenkins.)

A. Sometimes he would be sitting at a desk, and sometimes lying on a lounge.

Q. Did you ever have a conversation with him, Mr. Jenkins, concerning his business affairs or his property?

A. Well, the conversation wasn't directly with me, but I did hear the conversation one day. It was my wife and my sister were there, and the conversation came up, something about that he wasn't satisfied with the will, and he wanted Joe to have the property in Deer Lodge. That's all I know.

Q. To whom was he addressing it? To whom was he talking? [187]

A. To my sister.

Q. Oh, I see. Was there any other time that you heard him say that?

A. Well, I heard him say frequently after that that he wanted—that Joe and he had been such good friends, and that he wanted Joe to have the property in Deer Lodge.

Q. How late would you say that conversation or that statement took place, as much as you can recall?

A. Well, I would say that took place almost the last time I saw him.

Q. In your opinion, Mr. Jenkins, would you say that he was rational or irrational?

A. I would say that he was rational.

Q. In your observation, would you say that he had control of his mental faculties or not?

A. I would say he would.

(Testimony of Jack R. Jenkins.)

Q. And would he speak normally?

A. Yes, he would.

Q. From the time you first knew him until the time of your last visit, did he ever react abnormally from previous occasions? A. What?

Q. Did he act the same up to the last time you saw him? A. Yes. [188]

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): Are you related to Mr. Grenier? A. No, sir.

Q. You knew him in Montana, though?

A. Yes, sir.

Q. You are a friend of his?

A. Well, I never met Joe personally—I never met him until about four or five years ago, but I have known of him and knew of him I would say the last 40 years.

Q. When was the last time you saw Mr. Harley alive?

A. Oh, just before the 1st of July, around in there.

Q. Did you call on him on that occasion alone?

A. No, sir.

Q. Who was with you? A. My wife.

Q. Did you always take your wife with you to see him? A. Yes, sir.

Q. You never went alone? A. No, sir.

Q. Now, this conversation that you overheard with reference to wanting Joe to have the prop-

(Testimony of Jack R. Jenkins.)

erty, when did that take place, the first conversation? [189]

A. That took place right after Mrs. Harley's death.

Q. Right after she died. Where did it take place? A. Over at Dan's house.

Q. And who was there?

A. My wife and my sister.

Q. And who else?

A. Well, possibly the nurse was there.

Q. Was Mr. Grenier there? A. No, sir.

Q. Was Mr. Edgar there? A. No, sir.

Q. On that occasion were you talking to Mr. Harley or was your wife talking to him, or your sister?

A. Well, the conversation was in general. The four of us was sitting there.

Q. What led up to this statement that you say he made? What were you talking about?

A. I think how the conversation come up, there was some remark that Dan had said to my sister about an estate that she had in Detroit. He asked her how she came out with some property, or something, that she had in Detroit, and I think that's how the conversation come up.

Q. What brought Mr. Grenier's name into the conversation?

A. Well, the way that things were, why, Joe— [190] or, Dan said that he and Joe had been such good friends, and they had been partners for years,

(Testimony of Jack R. Jenkins.)

that he wanted Joe to have the property in Deer Lodge.

Q. To have all the property in Deer Lodge?

A. Yes, the property in Deer Lodge.

Q. Did he say he had made a will, in which he had left his friend Joe a half interest in the Deer Lodge property?

A. No, the will wasn't mentioned.

Q. Did he say anything about a will?

A. Only that one will that was made up, that he was dissatisfied with it.

Q. This was what he said in this conversation in March of 1955, that he was dissatisfied with the will?

A. Well, I don't know when it was. It was after Mrs. Harley's death.

Q. Did he say on this occasion you have referred to, that he had already deeded the property to Mr. Grenier? A. No.

Q. He never did tell you at any time he deeded it to him, did he? A. No, sir.

Q. What he told you was he wanted him to have it? A. That's right.

Q. That's right, isn't it? [191]

A. That's right.

Q. That was the last time you saw him when the subject matter was discussed, all that he said was he wanted him to have it, didn't he?

A. That's right.

Q. He never said he had already deeded it to him? A. No.

(Testimony of Jack R. Jenkins.)

Mr. Young: That is all.

Mr. Boshae: I have no further questions.

The Court: You may step down, Mr. Jenkins.

(Witness excused.)

The Court: Do you have another witness?

Mr. Boshae: That is about it, your Honor.

The Court: Does the defendant rest?

Mr. Boshae: We will rest, with the exception of——

The Court: Of the doctor?

Mr. Boshae: Of the doctor, your Honor.

The Court: Very well. When will the doctor be here tomorrow morning?

Mr. Boshae: I have instructed him to be here at 9:30.

The Court: Very well. Is there any objection to resuming at 9:30?

Mr. Young: None at all, your Honor.

The Court: Very well.

We will recess the trial until tomorrow morning at 9:30. [192]

(Whereupon, at 4:55 o'clock p.m., Wednesday, October 31, 1956, an adjournment was taken until 9:30 o'clock a.m., Thursday, November 1, 1956. [193])

Thursday, November 1, 1956. 9:30 a.m.

The Court: Are there ex parte matters?

The Clerk: No, your Honor.

The Court: In the case on trial, you may proceed, gentlemen, No. 18715.

Mr. Boshae: I don't know whether Mr. Young wishes to finish his case.

Mr. Young: I understand Dr. Ogden is here, your Honor. I haven't interviewed him. Counsel tells me he is going to put him on the stand, and I didn't want to miss the opportunity of putting him on.

Mr. Boshae: I didn't say anything of the kind.

Mr. Young: When I talked to you on the telephone, you said you were going to subpoena him.

The Court: Now, gentlemen, none of this. If you wish to reopen the plaintiff's case, call the doctor.

Mr. Young: No, your Honor.

The Court: You rest?

Mr. Young: I rest.

The Court: Do you wish to make your motion now, that you have reserved?

Mr. Boshae: Yes, your Honor, I would like to.

If the court please, the defendant makes a motion to dismiss the plaintiff's claim in this matter on the following grounds: [195]

That the evidence, taking all reasonable inference is in favor of the plaintiff, I don't think, your Honor, that the plaintiff has established a case of obtaining a conveyance of this property by undue influence or fraud, or that the grantor was physically incapacitated.

If we analyze the testimony——

The Court: Doesn't the—proceed.

Mr. Boshae: What is that, your Honor?

The Court: You proceed. I will not interrupt you.

Mr. Boshae: May I make this observation, for the purpose of expediting it: If there is any question in your Honor's mind of denying the motion, I will forego the argument.

My thought was this: The only evidence that I could see that would establish any case insofar as the plaintiff is concerned was that Mr. Grenier had told Mr. Edgar that he got the conveyance merely for the purpose of waiting until the outcome of some other litigation between the deceased and his sister-in-law or some other relative had taken place.

And in connection with that, your Honor, I submit that that has nothing to do with the intention of the grantor. It wasn't directed as to what was said, anything that was said by the grantor, and I feel, your Honor, that the plaintiff has not established a case in this matter. [196]

The Court: Doesn't the evidence establish the existence of a fiduciary relationship between the decedent and the defendant?

Mr. Boshae: Yes, I will concede that, your Honor.

The Court: Then wouldn't that shift the burden to the defendant?

Mr. Boshae: Yes, it would, your Honor, excepting I think that it has been overcome by a failure to produce any wrongful acts on the part of the grantee. I don't think there is anything in the record to show there was any wrong dealing, or dealing beyond arm's length, or where there was no disclosure, where there was a failure of disclosure

by Mr. Grenier to Mr. Harley that he had done anything wrong.

In fact, I think the plaintiff's evidence shows—I am sure it does—when Mr. Edgar and Mr. Harley stated on June 18th they were told, both of them were told, that the deed was given by Mr. Harley to Mr. Grenier. They knew about it, and it was supposedly to someone who purported to be an heir-at-law or to have been a legal counselor of the deceased, and nothing was done about it. The deed shows on its face that it was recorded shortly after it was given, I think it was on the 18th of May, and there was no concealment. Everything was open and above board, and they took no action to do anything about it until after the deceased had had his mouth sealed by death, and then they come in now to set it aside. [197]

I submit, your Honor, even upon the plaintiff's own testimony in evidence that the burden has been overcome,—by the testimony of Mr. Edgar and Mr. Harley.

The Court: Isn't the burden on the defendant to show that it was a gift? Since admittedly no consideration was paid, isn't the burden on the defendant to show it was a gift?

Mr. Boshae: Yes, I agree to that proposition, your Honor.

The Court: No gift tax has been paid, and, apparently, no gift tax return was made. When was the gift tax return due, under the law?

Mr. Boshae: I think it is 18 months after the gift, your Honor, and so far as the gift tax is con-

cerned, that has no bearing on the grant. That is for the Government to determine.

The Court: I am not suggesting that this is the proper place to collect a gift tax, but presumably donees obey the tax laws. If this were a gift, the tax would be paid.

Mr. Boshae: That is correct, but there is no issue here being raised that the gift tax is due at the present time.

The Court: I am asking you what the state of the law is on it.

Mr. Boshae: As far as I understand, from what I have [198] been informed of it, your Honor,—I am not too familiar with the gift tax law—but I understand that Mr. Grenier consulted the Internal Revenue Department, and they told Mr. Grenier that it wasn't necessary to pay it at this time for two reasons: One, it would be premature for him to pay it, and, No. 2, the donor was required to pay it.

The Court: Both the donor and the donee are required.

Mr. Boshae: Yes. That is what I was informed by Mr. Grenier that the Internal Revenue Department informed him. Of course, that has nothing to do with the plaintiff's case here.

The Court: The motion will be denied.

Mr. Boshae: Thank you.

The Court: Your next witness for the defense.

Mr. Boshae: Yes, your Honor. Dr. Ogden, please.

DR. WALTER R. OGDEN

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Walter R. Ogden, M.D.

Direct Examination

Q. (By Mr. Boshae): Dr. Ogden, what is your business or profession?

A. I am a doctor of medicine. [199]

Q. Are you licensed in the State of California—

A. Yes.

Q. —to practice medicine? How long have you been so licensed, doctor?

A. Since 1942.

Q. Have you specialized in any particular field?

A. No, I am a general practitioner.

Q. Now, Dr. Ogden, do you know, or did you know an individual by the name of Daniel L. Harley?

A. Yes.

Q. When did you first see him, Doctor?

A. I think I met Dan in 1948 or '49.

Q. And what was the occasion of your getting acquainted with him?

A. He had been treated by my partner at that time, Dr. Simons, and in Dr. Simons' absence once I saw Mr. Harley when he was ill, and subsequently we operated on his stomach, and I treated him from then on over a period of five or six years until he died.

Q. And how often did you have occasion to see him, Dr. Ogden?

(Testimony of Dr. Walter R. Ogden.)

A. Well, during those early years, the early '50s, oh, perhaps every couple of weeks or months. Sometimes daily when he would have severe illnesses. During his last year, much more frequently. After his wife died in the early spring,— [200]

Q. Of what year, please?

A. Of last year, 1955, then I saw him almost constantly. Daily for a long time, and several times a week always.

Q. And when you would see him, Doctor, say, before May 16th, 1955, what did you observe was his condition,—I mean his physical appearance and his mental condition?

A. His physical condition was a severe illness. On occasions he had emphysema of his lungs, and he didn't have much breath. In other words, he couldn't walk or maneuver very far without getting out of breath. He had some heart failure on occasions. He had bouts of pneumonia. He had several serious illnesses during the spring of 1955, but mentally Dan was real clear and real competent until he had his last illness, which was a stroke that occurred just about 24 to 36 hours before he died.

Q. Now, did you have occasion to see him up to that time? A. Yes.

Q. And what was his condition on or about—if you recall, on or about May 16, 1955?

A. Well, on or about May, or during May and that period, he was confined to the home primarily. He rarely came to my office. I think he made his last visit to my office in late April. From then on

(Testimony of Dr. Walter R. Ogden.)

I called on him at home only, although he did go out. Joe would ask me could he take [201] him for a haircut, and this and for that, and to the bank to do business, and various things, so he did go out of the home, but he didn't drive himself after—I don't think he drove after his wife died. He may have, however, a time or two.

Q. Now, Doctor, could you tell us whether or not he could walk?

A. Yes, he could walk up until he had his last illness, the date before he died.

Q. He could walk up until that time?

A. Yes.

Q. Did you know his condition with reference to his eyesight?

A. Yes. I think, and I feel sure that Dan could see, and quite well, up until he had his last illness.

Q. And when was that illness?

A. Well, the last illness is the 24 to 36 hours before he died.

I returned from a week's trip in his old home state, Montana, and Yellowstone National Park, just two days before that, and when I came back and hadn't seen him in about a week, he was sitting at the couch near the window, and he turned and recognized me, and spoke to me through the window. I walked to the window before I came around to the door.

Yes, Dan could see up until the day he died. [202]

Q. Now, Doctor, do you have an opinion as to his mental condition, mental sanity or insanity?

(Testimony of Dr. Walter R. Ogden.)

A. Well, Dan was sane. He was mentally competent and sane. I came to such a court here last year about that.

Q. You mean in the guardianship matter?

A. Yes, while he was still alive.

Q. The instance we are speaking of is subsequent to that guardianship matter, and that is what we are interested in at the present time. Would you say he was sane or insane mentally?

A. He was sane.

Q. Now, in your opinion, Doctor, was he rational or irrational?

A. He was always rational until he had his last illness, that 24 to 36 hours.

Q. Now, doctor, would you say, in your opinion, that he was a normal individual, who could transact normal business? A. Yes.

Q. As far as mental capacity is concerned?

A. Yes.

Q. Now, Doctor, did he ever discuss any of his business affairs with you?

A. Yes, quite a few of them; business affairs, personal affairs, and everything.

Q. Did he ever discuss any property matters with you? [203] A. Yes.

Q. Did he ever discuss any property matters in connection with Mr. Grenier? A. Yes.

Q. Would you tell us what he said, if you can recall, please? Did he ever discuss any Montana property? A. Yes.

Q. All right. Would you kindly tell us what he said, if anything.

(Testimony of Dr. Walter R. Ogden.)

The Court: Why don't you lay the foundation now, as to time, place, and persons present?

Mr. Boshae: I am sorry, your Honor. Thank you.

Q. Could you tell us, Doctor, the approximate time you had the first conversation with Mr. Harley in connection with any statements or conversations you had with respect to his property in Montana?

A. Yes. In the spring after his wife had died, Dan told me that——

Mr. Young: I object, your Honor. There is no foundation as to persons present or where it occurred.

Q. (By Mr. Boshae): All right. Was there anybody present besides you and Mr. Dan Harley?

A. On a number of occasions he talked about this thing with me alone, and with Mr. Grenier. I am not sure where it was discussed in front of his nurse, but I think it was. [204]

Q. All right.

A. So, at least, those people, but it happened something like this,——

Mr. Young: I object to the conversation, your Honor, on the ground it is hearsay.

The Court: Overruled.

Q. (By Mr. Boshae): Go ahead, Doctor.

A. After his wife had died,—Dan had been seriously ill with pneumonia just prior to his wife's death, and I had had him in the hospital, and he got over that, and was at home when she passed away. I went to see him within a few hours after she

(Testimony of Dr. Walter R. Ogden.)

had died, and it was subsequent to that that he introduced me to Joe Grenier.

He told me Joe had been a lifelong friend, that they had been in business together, and a bit about the background of he and Joe together. When I asked him who Joe was, then he introduced me to him.

I think that is the first time he ever told me anything about the Montana property, except that over the years he had told me that he did have property in Montana.

Q. What did he tell you, if anything, about the Montana property at that time?

A. At that time Dan told me that he had inherited through the death of his sister the mother's estate, something in the East, and he knew now that he had plenty of [205] money. That's the way he used to put it.

He said, "I used to wonder if I would have enough to live out my life, and live in the fashion that I was accustomed to," and so on, but he said, "I know now I have enough," and he told me a bit about that.

He told me that he was going to deed to his nephew, Jimmy Harley, certain property that had come through this estate of the mother, and then his sister, and at that time is the first I remember of him telling me that he was going to deed to Grenier certain property in Montana. He told me it was an old bowling alley, and I think something—an old building the bank used to occupy at one

(Testimony of Dr. Walter R. Ogden.)

time, and a tavern or old building in Montana, some buildings in Montana.

Q. Was that the substance of that conversation at that time?

A. Yes. That was the first I recall hearing anything about Joe and him and property.

Q. Now, Doctor, could you tell us if you had any other conversation in connection with the Montana property?

A. Yes, I had a number of conversations with him, because Dan used to like to have me sit there and talk. He wanted me to spend time with him, which I did on occasions, and——

Q. Could you give us the approximate time when the other conversation, the next conversation took place, if you can recall? [206]

A. Well, I remember that it was discussed by he—by Dan and Joe Grenier a will that was being formulated. This is about in April, and one day I received a telephone call from an attorney, Joe Edgar, or a Mr. Thompson, one of the two of them called me and asked me about Dan, and so forth, and was he mentally competent, and so on. So they had me meet at Dan's home this day in April to——

The Court: To witness?

The Witness: ——to witness a will. Now, during the few days prior to that Dan had the nurse call me to come over, and he read to me considerable of that will that I was going to witness.

Q. (By Mr. Boshae): Dan read to you?

(Testimony of Dr. Walter R. Ogden.)

A. Dan read to me, and he read about willing to Joe Grenier a half interest in this property in Montana.

I witnessed that will some time after that, I think the next few weeks after that, and, oh, on several occasions Dan had told me that his nephew Jimmy wanted to move him, wanted him to close up his house, sell it, move to Long Beach, live with him. He didn't want that. Dan wanted to stay there. Dan wanted to live there as long as he lived. He used to tell me he didn't think he would live very many months, and he wanted to live it out here.

He said, "I want you to take care of me, I want to be [207] with my friends, Joe stays with me as much as he can," and so on, and so forth.

So soon after this will was witnessed by me, then Dan told me he had decided to deed the property in Montana over to Joe Grenier before he died.

Then some weeks later, just how long I am not sure now, but some weeks later he told me he had deeded it to Joe Grenier.

So that's what I know about the property in Montana.

Q. And was there anybody present when he told you this?

A. Joe Grenier was there on several occasions, because Joe told me, described the property to me a little bit, and the two of them used to talk about the property together, and how—Dan used to explain how drunk he used to get in a tavern that was near this property, or within a part of the

(Testimony of Dr. Walter R. Ogden.)

property, and he used to like to go back over his escapades in youth with Dan—or, with Joe in my presence.

Q. Now, did he ever tell you, Doctor, that he was incompetent and wanted a guardian appointed?

A. No.

Q. Did you ever see Jim Harley there?

A. Yes, I have seen Jim at the home. I don't know how many times, but I think I have seen his wife and child there more than him. They stayed there when he was at work, I guess. [208]

Q. Was there any discussion between you and Mr. Jim Harley with reference to the appointment of a guardian of any kind for Mr. Dan Harley?

A. No. No, when they wanted to appoint the guardian, Dan was real upset. In fact, he asked me, "Do you think I am crazy?"

"Certainly not, Dan."

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): When did Mr. Harley suffer pneumonia, or have pneumonia?

A. The attack that I speak of was prior to the death of his wife, some weeks prior to that.

Q. Did you send him to the hospital?

A. When he was in St. Joseph's Hospital.

Q. It was a severe case of pneumonia?

A. Yes.

Q. And he was hospitalized by you?

A. Yes.

(Testimony of Dr. Walter R. Ogden.)

Q. Did he suffer a stroke? A. Yes.

Q. He suffered a stroke a couple of days after [209] his wife died, didn't he?

A. No. He had his stroke just the day before he died, clear up in late July.

Q. Didn't he have a stroke before that,——

A. No.

Q. ——two days after his wife died?

A. No.

Q. Did you employ Mrs. Studebaker, his nurse, or refer her to him?

A. Yes. I didn't exactly employ her. He employed her, and then I gave her directions. She was the nurse for his wife, and she just stayed on after the wife died.

Q. Did Mrs. Studebaker keep a chart of the time she was with your patient?

A. Yes, she used to keep certain records.

Q. Well, did she furnish you with any notes?

A. Yes, I am sure I used to look at her notes and the records on the visits.

Q. Do you know where those records are now?

A. No, I don't.

Q. Do you have them in your possession?

A. No, I don't.

Q. Didn't Mrs. Studebaker tell you that on the 22nd day of March Dan had a slight stroke?

A. She may have. I don't recall. She used to [210] get real excited and upset about the various little things that would happen to Dan.

(Testimony of Dr. Walter R. Ogden.)

Q. She could have told you that he had a slight stroke?

A. She could have said that, yes.

Q. What was the diagnosis that you made of his case, involving all of the things that he suffered from? A. You mean after he died?

Q. Well, I don't believe so. I think during the time he was alive, after his wife died.

A. When? Oh, after his wife died?

Q. I will ask you specifically. He had heart trouble, didn't he? A. Yes.

Q. And he had a severe heart case, didn't he?

A. He had heart failure, yes.

Q. Describe to us the condition of his heart.

A. He had heart failure, I felt, on the basis of hardening of the arteries.

Q. And he had a very severe case of arteriosclerosis, which is hardening of the arteries; isn't that right? A. Yes.

Q. He couldn't get circulation down to his feet, could he?

A. Oh, yes. He had no foot trouble.

Q. Were his ankles swollen from the time his [211] wife died up until he passed away?

A. Yes. That is one of the things I was treating him for constantly.

Q. And what treatment did you give him in that connection?

A. Well, various medications for such.

Q. Did you give him sedatives?

(Testimony of Dr. Walter R. Ogden.)

A. Yes, I am sure Dan had some phenobarbital, some sedatives.

Q. Every day after his wife died until he passed away?

A. I don't know that he had it every day, but I think he had taken some sedatives for years.

Q. Didn't he have a serious involvement of his respiratory system, also? A. Yes.

Q. What did that amount to, what did it consist of, the respiratory trouble?

A. He had emphysema, that is, his lungs did not function properly on exercise. They couldn't take in and put out enough oxygen into his blood with exercise. So he led a rather sedentary life for the past several years.

Q. Did you prescribe oxygen for him after his wife died? A. Yes.

Q. Did he take that daily? [212]

A. I don't know that he took it daily. He had taken it a lot before she died, and after.

Q. It is a fact that after his wife passed away, he was practically bedridden all the time, isn't it?

A. No.

Q. Isn't it a fact, Doctor, that after his wife passed away he was on his deathbed up until the time he died on the 30th of July?

A. Oh, no. Dan,—I am not sure that he drove his car afterward, because I think Jimmy took his car away, and said he shouldn't drive. At least, I told him he shouldn't, but he came to my office a number of times after she died, and I made calls

(Testimony of Dr. Walter R. Ogden.)

to see him at home, when he wasn't even there, long after she died. He would be downtown.

Q. With Joe Grenier?

A. With Joe, or with someone else.

Q. Did you discuss this case with Joe Grenier before coming to court? A. Discuss it?

Q. Yes. A. No.

Q. Have you seen Joe Grenier at any time except this morning in the last three months?

A. Yes.

Q. When? [213]

A. Three months? I saw Joe last week. Joe came to my office last week. I don't know what day now, but it has been perhaps a week ago.

Q. On that occasion did you discuss your testimony with him? A. Well, discuss, no.

Q. You didn't talk to him about what you were going to testify?

A. Yes, I did talk to him. Joe told me that it looked like I was going to have to go to court, that people were trying to say that Dan was incompetent, and couldn't see, and asked me if that was true, could he see.

I said, "Yes."

He said, "Well, I took him to an optometrist to get some glasses for him, and now that man says he couldn't see."

And this was back in the spring. I have forgotten when he told me.

I said, "Well, that is for sure not true," and I said, "I will be happy to back you up in such."

(Testimony of Dr. Walter R. Ogden.)

Q. Did you discuss these conversations that you have testified about, where you said you were present, and Mr. Harley and Mr. Grenier, and Mr. Harley talked about this Montana property?

A. No, Joe didn't ask me about the property per se.

Q. He didn't say anything to you about that?

A. No.

Q. By the way, when did the first conversation take place that you heard, with reference to property being conveyed to Mr. Grenier?

A. By "conveyed," you mean being deeded to Mr. Grenier?

Q. Deeded, yes.

A. I think soon after his wife died Dan told me he had done it. He told me he was going to before that.

Q. When was it deeded?

A. Well, I don't know exactly when it was deeded, but I gather from this conversation that you are talking about, May, the 1st of May.

Q. Is that what Mr. Grenier told you?

A. The 1st of May, or something.

Q. When did you talk to Mr. Harley? Fix a date, as well as you can, when you talked to him about any deed to Mr. Grenier.

A. Well, near the time of the will which I witnessed, which was in April sometime.

Q. Was it before or after the will was written?

A. Before, because Dan read to me from the will that he was going to deed him half of the

(Testimony of Dr. Walter R. Ogden.)

property, or give him half of the property. Then after that he told me he was going to deed it all to him.

Q. How long after you had this conversation [215] about the will, did he tell you he was going to deed it all to him?

A. I don't know. I think within the next month, within the near future after that.

Q. Do you recall the date you witnessed the will? A. No, I don't.

Q. Then you would fix the time that you had the conversation about the deed with Mr. Harley, the deed from Mr. Harley to Mr. Grenier, as around the 1st of May?

A. That he had deeded it to him?

Q. Yes.

A. I don't know exactly what date it would be.

Q. Well, can you give us an approximate date?

A. As close as I could come would be the next month after I witnessed the will, the next month or even two. I am not sure. We had conversations before he deeded the property to Joe, and then again after he had, and he also told me of deeding certain property to his nephew Jimmy.

Q. When was the second occasion that he told you that he had deeded the property to Mr. Grenier, the Montana property?

A. Well, as I spoke before, the first occasion when he told me he had deeded it was, I assume, soon after it was done, because I recall coming there and he wasn't there, and I think when they

(Testimony of Dr. Walter R. Ogden.)

returned in a few minutes, while I was still there speaking with the nurse, he and Joe told me they [216] had been to the bank.

Now, whether that was because of that, or because of some money he had been drawing out and giving Joe from the bank, I don't know, but they talked about this. I am not sure. But then the second occasion, I don't know when it would be, but I know that even when I returned from Montana and from Yellowstone National Park in July, just a few days prior to his death, he told me that Joe now owned the property up in Montana, because he talking about going back to Montana.

Q. What date was that?

A. I think either just a few days or within a week before he died.

Q. Did you go to his house to see him?

A. Yes.

Q. On that occasion did he tell you he was going to marry his nurse?

A. They discussed such.

Q. In your presence?

A. Kidded about such, yes, in my presence. She wanted to marry him and take him to Honolulu. They were talking about going to Hawaii.

He said, "Well, I will never get well enough." He said, "If you can get me well enough to go to Montana, though, I would like that." [217]

Q. Did he tell you that he was going to marry Mrs. Studebaker?

A. I don't know that he ever told me that he

(Testimony of Dr. Walter R. Ogden.)

was actually going to marry her, but I remember that they kidded about it, and discussed the matter.

Q. Well, as a doctor, would you consider that a man of his age,—77 years, wasn't he?

A. Yes.

Q. —and with the physical condition that he was in, that if he would discuss marriage with his nurse that that would indicate to your mind he was in full possession of his faculties?

A. Well, he was a great kidder, and so was she, you know.

Q. You think he was kidding, then?

A. I would think so. I don't think he ever intended to get married.

Q. Didn't he tell you that he was either going to marry his nurse or was going to leave her his property in Glendale where he was living?

A. Well, he talked about leaving her property, yes, but I don't think he ever put it that way, that he was either going to do one or the other.

Q. Do you consider that a normal condition for a man in his physical state, as you have described [218] it, at his age, to be deeding property to his nurse?

A. He didn't ever deed any property to her.

Q. Or to talk about it?

A. Yes, I consider it quite normal. Many older people that get attention from younger women talk about deeding things to them.

Q. You refer to Mrs. Studebaker as a younger woman?

A. Younger than Dan.

(Testimony of Dr. Walter R. Ogden.)

Q. She was in her sixties, wasn't she?

A. I think near that, near sixty.

Q. A white-haired old lady?

A. But he was seventy-five.

Q. What is that?

A. But he was seventy-five.

Q. Do you consider a man—strike that.

What was his physical condition, with reference to his energy or his ability to act in a normal way after his wife died?

A. He didn't have very much energy. Short walks would tire him. He would walk around the house and be tired.

Q. How much did he weigh when you had him in the hospital with pneumonia?

A. I don't recall. He was thin for years and years, real thin.

Q. How much did he weigh, though, when you had him in the hospital? [219]

A. I don't know.

Q. How much did he weigh when he died?

A. I don't know.

Q. He didn't weigh over 80 pounds, did he?

A. I think Dan weighed more than 80. I don't think he ever got that down.

Q. Did you ever weigh him? A. Oh, yes.

Q. When was the last time you weighed him?

A. I don't know now.

Q. What did he weigh?

A. I don't know, but I would fix his weight at near 90 to 95, his low weight, in the 90s.

(Testimony of Dr. Walter R. Ogden.)

Q. Well, do you consider that a normal condition for a man his age, to weigh only 90-95 pounds?

A. Well, not normal, no, certainly not. Not ideal, anyway.

Q. Did he talk to you about dying after his wife passed away? A. Yes.

Q. He told you he knew he was going to die, didn't he? A. Yes.

Q. You knew it, too?

A. I didn't think he would live too long, no.

Q. You didn't think he would live three months after his wife died, did you?

A. Even before that, I didn't think so.

Q. So you weren't surprised when he died on the 30th of July, of 1955? A. No.

Q. Now, Doctor, is Dr. Owens associated with you?

A. No, Dr. Owens has an office across the street from me. At the time that Dan, when he was treating Dan, though, he was in the same building I am in. He treated Dan in my absence, when I was in Yellowstone, and also saw him with me in consultation prior to my going to Yellowstone, and after I returned also.

Q. How long were you away when you went to Yellowstone?

A. I think about eight to ten days.

Mr. Young: May I approach the clerk's desk, your Honor?

The Court: You may.

Q. (By Mr. Young): Did you submit a state-

(Testimony of Dr. Walter R. Ogden.)

ment for your services prior to Mr. Harley's demise?

A. I guess, yes, many of them over the years.

Q. When was the last time you were paid for your services?

A. I don't recall now. I know I received some money from Dan or Joe during the time I treated him in the spring, or in the summer, too, before he died. [221]

Q. Well, you were paid up through the month of June, weren't you?

A. I don't think so. I don't think I have ever been paid up from him for years.

Q. What do you mean?

A. Well, he continually owed me money over the years, let's put it.

Q. Didn't you submit regular bills?

A. Yes.

Q. How much did you charge for a house visit?

A. Varying amounts, depending on what I did, and when it was.

Q. Were you there every day?

A. Sometimes I would see him more than once a day.

Q. I show you a check dated May 13, 1955, payable to you, signed by J. H. Grenier, for \$90.

A. Yes.

Q. Did that pay you up to the date of that check?

A. I don't know. That might have been for laboratory work done then, or for medication. I fur-

(Testimony of Dr. Walter R. Ogden.)

nished him with medicine, and laboratory work, and so on, too.

Q. Did you furnish him with itemized statements?

A. I don't think so. I don't think he asked for any itemized statements.

Q. I show you a statement dated August 2, 1955, to [222] Dan L. Harley, in the sum of \$1,400. Did you send that statement? A. Yes.

Q. What services did that cover?

A. This was a bill sent to him—sent to him, or sent to his estate right after he died.

Q. On August 2?

A. For all my services up to and including his last illness.

Q. What were your services during his last illness?

Mr. Young: First, we offer the statement in evidence, your Honor, as the plaintiff's next exhibit.

Mr. Boshae: I don't see the materiality. I object on the ground of its being incompetent, irrelevant and immaterial.

The Court: Overruled. Received in evidence.

The Clerk: Plaintiff's Exhibit 15.

(The document referred to was marked Plaintiff's Exhibit 15 and was received in evidence.)

Q. (By Mr. Young): Can you tell me the services you rendered for that bill for \$1,400?

A. Well, here is a man that I treated for at

(Testimony of Dr. Walter R. Ogden.)

least eight years, saw not hundreds of times, but thousands of times.

Q. He was pretty sick, then, wasn't he? [223]

A. Yes, on many occasions.

Q. Do you mean to state he didn't keep you paid up currently? A. That's right.

Q. Where are your books, your records?

A. At my office.

Q. Has Joe Grenier paid you any money since Mr. Harley died?

A. No. I have been trying to get Jim Harley to pay it. I have written several—filled out papers, and so on, and so forth, and was told I was going to be paid by the Veterans Administration, and so on. I filled out papers for them.

Q. Has Mr. Grenier paid you any money since Mr. Harley died for anything?

A. No, I am sure he hasn't. He may have sent a check about that time, but I am not—

Q. He hasn't paid you anything on account of this statement for \$1,400? A. No.

Q. You didn't file a claim in the estate of Dan L. Harley for that bill, did you? A. Yes.

Q. You filed a claim?

A. Well, we did what Jimmy told us to do. He wrote a letter, and told me to fill out some papers, and I had my [224] secretary fill them out.

Q. That is in connection with the Veterans Administration, isn't it?

A. That is who he told me was going to pay it, or something.

(Testimony of Dr. Walter R. Ogden.)

Q. You didn't file a claim in the probate proceeding, did you?

A. I don't know they even have it. We sent the bill, but we have never filled out any statements we had to file.

Mr. Young: That is all, your Honor.

The Court: Any redirect?

Mr. Boshae: I don't think so, your Honor.

The Court: You may step down, Doctor.

Is there any occasion to require the further attendance of Dr. Ogden?

Mr. Young: No, your Honor.

Mr. Boshae: I don't think so.

The Court: You are excused, Doctor.

The Witness: Thank you.

(Witness excused.)

The Court: The next witness.

Mr. Boshae: Joe Grenier. I think you have been sworn before, Mr. Grenier. [225]

J. H. GRENIER

the defendant herein, called as a witness in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Boshae): Mr. Grenier, how long had you known——

The Court: Conduct your examination from the lectern, if you will, Mr. Boshae.

Mr. Boshae: Sir?

The Court: If you will conduct your examina-

(Testimony of J. H. Grenier.)

tion from the lectern, we can hear better. There is a loudspeaker there.

Mr. Boshae: All right, your Honor.

Q. (By Mr. Boshae): Mr. Grenier, how long had you known Mr. Dan Harley prior to his death?

A. Well, that is pretty hard to state. I knew Dan when I first hit Montana, and I would say I got more or less intimately acquainted with him around 1906 or 1907, or somewhere around there. I couldn't state the exact year.

Q. Where did you meet him?

A. In Butte, Montana. We happened to work for different concerns. I followed the electrical business, and so did he. We would work here one week, and two weeks there, at different places, and we become acquainted through those [226] different periods of working together.

Q. And did you come to know him very intimately?

A. Yes, very intimately.

Q. Did you ever have any business dealings with each other?

A. By that, what do you mean?

Q. Were you ever involved together?

A. Yes, we did business together in different ways.

Q. Did you ever lend him any money?

A. Yes, I did. He loaned me some money, and I have loaned him some money.

Q. How often did you have occasion to see him over this period of years?

A. Well, up to the time he left Montana, I would see him practically every day.

(Testimony of J. H. Grenier.)

Q. You were working for him; is that correct?

A. I worked for him for three years after I come back in 1925. That is, he was my immediate boss, and we were both working for the power company.

Q. Have you continued your correspondence and friendship up until his death?

A. Yes. We lived together, our families did, and we were very intimate.

Q. Now, did you know he came to California in the '40s, sometime in the 1940s? [227]

A. Yes, he came to California the winter of 1947.

Q. And did you ever come to visit him during that time? A. After the time he come here?

Q. Yes.

A. Yes, three and four and five times a year.

Q. And what was his condition when you would see him, his physical condition?

A. Well, up until that time Dan had ulcers, stomach ulcers. That is, he didn't become in the condition he was in until after he was operated on for them, but he had stomach ulcers.

Q. Was he ever a heavy-set man?

A. No, no. Dan was always a thin man.

Q. Now, with relation to the spring of 1955, were you ever called to his home?

A. In the spring of 1955, yes.

Q. When were you called at that time?

A. Well, the first time was in March when his

(Testimony of J. H. Grenier.)

wife died. He called me up on a Sunday morning, and I flew down Sunday afternoon.

Q. And what were the circumstances then? Did he ask you to do anything, or did you have any conversations with him of any kind, then?

A. Well, yes. Yes, we had conversations [228] regarding different things, making arrangements pertaining to the funeral, and things of that sort.

Q. Did you observe his condition at that time?

A. Did I observe his condition?

Q. Yes.

A. Yes, he wasn't a well man by any means.

Q. Did you form an opinion as to his mental sanity at that time?

A. Yes. Dan was very, very sane. He was a brilliant man. Dan had a brilliant mind.

Q. Now, after his wife passed away, what did you do? Did you leave, or did you remain there?

A. No, I stayed a few days. Then I left and went back to Montana.

Q. Did you go back to Montana? A. Yes.

Q. When was the next time that you heard or saw Dan Harley?

A. Well, very shortly after that he called up, and wanted me to come down, and wanted to talk to me regarding different things.

Q. What did you talk about?

A. Oh, mostly his business affairs and things of that sort.

Q. Did he ever talk to you about any wills, or [229] anything like that, or any of his property?

(Testimony of J. H. Grenier.)

A. Well, about the wills,—you are talking about wills. There was a will made about that time, or I mean was signed about that time, the so-called March will. I don't know—all I know about that is hearsay, about that will.

Q. Were you present when the March will was made? A. No.

Q. When did you first find out about it?

A. When they were signing it, when the witnesses were signing it. I was eating my dinner in the kitchen, and they were in the other room.

Q. Now, how long did you remain at that time?

A. That is hard telling. I couldn't specify any time. I was going and coming all the time. I would get out of here and get back in Montana, and he would call me back. I would say that I was back and forth, oh, seven or eight times; maybe more, maybe less.

Q. Between what dates, Mr. Grenier?

A. Well, between March 20th and the last time that I come down here, I mean when he died.

Q. Now, were you here at the time that the April will was made? A. No, I wasn't here.

Q. When was the first time you heard of that will, Mr. Grenier? [230]

A. When I come back.

Q. When? A. After I come back.

Q. When was that?

A. Oh, I don't know. I haven't any idea what date.

Q. Had the will already been made?

(Testimony of J. H. Grenier.)

A. Been made and signed, according to my knowledge.

Q. Did you have a conversation with Mr. Harley in regard to the April will?

A. No, not at that time.

Q. When was the first conversation—when was the first time you had any conversation with him with reference to the April will?

A. Well, he was discussing the will, and he was dissatisfied with it.

Q. Can you tell us when that conversation took place?

A. That took place after the will was written. Of course, dates—I can't state any definite dates, no.

Q. Can you tell if anyone was present at the time that he was discussing it?

A. Oh, yes, several different people. Different people like these people that were here, these friends of his that were here, in their presence, and regarding being dissatisfied with the will. As for dates, or times, or who was there, or outside of the nurse, I couldn't say. [231] Joe Edgar was there a couple of times.

Q. Could you tell us, in substance, as far as you can recall, what was said,—what was said by him, or what was said by you, or by anyone else in your presence?

A. Well, the one remark I can't help but remember, when he said to Joe, "I am going to change the will. My will stinks. I am dissatisfied with it."

Q. Just tell us about that.

(Testimony of J. H. Grenier.)

A. Well, that's all I can say. The nurse was there, I imagine, and myself.

Q. Did Joe Edgar say anything in response to that?

A. Joe said, "Well, if you want to change your will, why not wait until this so-called trial that comes up regarding Miss Benifer, Katie Benifer I think her name is, until after that."

The Court: When he said his will stank, what will was he referring to?

The Witness: That April will, or so-called April will.

Q. (By Mr. Boshae): Now, when was the next time you spoke to him in connection with his property or wills, if you can recall?

A. When was the next time I spoke to him?

Q. Yes, afterwards.

A. Well, that conversation come up quite frequently. I couldn't say, I wouldn't want to make any definite statement. [232]

Q. Now, in connection—by the way, Mr. Grenier, at that time, when you had the conversation in connection with the April will, did you observe his condition then, his mental condition?

A. Yes, sure.

Q. Would you say that he was mentally sane or insane at that time?

A. Dan I considered was mentally sane and mentally efficient up until the time, the last time I saw him, and I think that was the Thursday I left. That was a few days before, three or four

(Testimony of J. H. Grenier.)

days before he died, when I left here to go back to Montana.

The Court: Is that April will in evidence here?

Mr. Young: Your Honor, I have it. I have the photostatic copy. I was going to put it in evidence on cross examination.

Mr. Boshae: I have no objection.

Mr. Young: We will offer it at this time, then, your Honor.

The Court: It will be received, pursuant to the stipulation, as Plaintiff's Exhibit—

The Clerk: 16, your Honor.

(The document referred to was marked Plaintiff's Exhibit 16 and was received in evidence.)

Q. (By Mr. Boshae): Mr. Grenier, when was [233] the first time that you had any discussion in connection with the Montana property, with Mr. Harley, Dan Harley?

A. What was that question again?

Q. When was the first time that you had any discussion with Dan Harley in connection with the Montana property?

A. When was the first time?

Q. When did you first talk to Mr. Harley about the Montana property, his giving you the Montana property?

A. You mean deeding it to me?

Q. Yes.

A. Well, that come up after this will.

(Testimony of J. H. Grenier.)

Q. Could you tell us who was present at that time?

A. No, I couldn't. The nurse was present, possibly, but I couldn't tell you.

Q. Could you tell us what the conversation was, what you said and what he said?

A. Yes, that he was dissatisfied with the will, and Joe Edgar wanted to hold off making a new will until after this trial of Benifer come up, so he was going to deed me the property, so there would be no questions asked, that there would be nothing—well, any questions regarding that particular piece of property, or words to that effect.

Q. Did you ask him for the real property in Montana?

A. No, I never did ask him for anything.

Q. Did you ask him to make a deed to you?

A. No, I didn't. No, he approached me about making a deed.

Q. Now, what did you do after he told you that he wanted to deed the property to you?

A. What did I do?

Q. Yes.

A. Well, I got this—he asked me to get these form deeds, and I went downtown and purchased a deed, a form deed.

Q. Is that the deed that we have in evidence here? A. Well, I imagine it is, yes.

Q. This one here?

The Court: Exhibit 1?

(Testimony of J. H. Grenier.)

Mr. Boshae: Yes, your Honor, I believe that is correct.

The Witness: Yes, that's it.

Q. (By Mr. Boshae): Now, Mr. Grenier, since your testimony of yesterday regarding the circumstances of your obtaining that deed, and leaving it with Mr. Harley, do you want to change your testimony in any way, or did you refresh your recollection in any way in connection with the dates?

A. Well, I went and purchased this so-called form, and I left it there, and I went back to Montana.

Q. Now, do you recall now whether or not that deed was filled in, or it was not filled in at that time?

A. I don't think so. I think the deed was filled after I come back. I don't recall that exact—

Q. Then you were incorrect yesterday when you stated that?

A. Yes, I was incorrect, because I don't actually recall whether I had that deed filled out, according to his instructions, that day or prior, but the form itself was around the house for about a week. I left and went up to Montana, and come back again.

Q. In other words, he did not deliver the deed to you until after you purchased the deed, then went back to Montana, and returned about a week later; is that correct?

A. That is when he had the description of the property.

(Testimony of J. H. Grenier.)

Q. Now, when did you buy the stamps on that deed, Mr. Grenier?

A. In Montana, the day it was filed.

The Court: Is the deed of July 28, 1955 in evidence?

Mr. Boshae: The deed of July 28th?

The Court: The will. I am sorry.

Mr. Young: That is the will, your Honor, that was contested.

The Court: Yes, I understand. Is it in evidence here?

Mr. Boshae: I haven't introduced it, your Honor.

Mr. Young: Yes, I thought it was introduced.

Mr. Boshae: I think, Mr. Young, that you introduced the order on the will. I don't know that you introduced the will. [236]

The Court: Exhibit 7 is the findings of fact and order denying petition to probate, and so forth, with respect to the will——

Mr. Boshae: I don't think so.

The Court: ——of July 28, 1955.

Mr. Boshae: I have no objection to its going in, your Honor.

The Court: Do you have a copy of it?

Mr. Young: I have a copy, with the copy of the petition to probate it enclosed within it. There are some pencil marks on it, and, of course, your Honor would ignore those anyhow.

Mr. Boshae: Do you want to remove that petition, Mr. Young? I don't think that is particularly important.

(Testimony of J. H. Grenier.)

The Court: Received in evidence as Defendant's Exhibit next in order. That is the will of July 28, the alleged will of July 28, 1955. Exhibit—what is it, Mr. Clerk?

The Clerk: H, apparently, your Honor. G is the last one I have. I think that was the last one. This will be H.

(The document referred to was marked Defendant's Exhibit H and was received in evidence.)

Q. (By Mr. Boshae): Mr. Grenier, did you ever make any statements to either Mr. Joe Edgar or Mr. Jim Harley, that you were going to take that property, the deed to that property, so that it wouldn't become involved in any litigation between Mr. Dan Harley and his sister or sister-in-law's estate? A. No.

Q. Did you tell them, or either of them, that you were going to take it for any other reason than that it was a gift to you?

A. No, there was no conversation ever brought up regarding this deed, outside of Dan telling them that he had deeded the property to me.

Q. Did you ever tell Mr. Dan Harley that you were going to take it in trust, or on condition that you were going to return it to him, or to the estate, or to anyone else? A. No.

Q. Now, Mr. Grenier, you know of the will contest in connection with the will of July 28th, do you not? A. Do I know of the contest?

Q. Yes. A. I know it was contested, yes.

(Testimony of J. H. Grenier.)

Q. And you filed the will for probate, is that correct? A. Did I file it for probate?

Q. It was filed for probate, that particular will?

A. I don't remember, but Mr. Wunderlich, or what is the name of the lawyer?

Q. Well, it was filed in your behalf, or by [238] Mr. Whitworth; is that correct?

A. Yes. I was mentioned as co-executor, or something. I didn't think I could act because I was a resident of the State of Montana.

Q. Is there any reason why you didn't show up on the contest?

A. Yes, because the money involved, so mentioned yesterday, I already had that in my name. I paid the inheritance tax on it, and transferred the account from the joint account to my account, and as per your instructions, I wasn't involved, I had nothing involved in there.

Q. You were advised by me not to appear; is that correct? A. That's right.

Mr. Boshae: I would like to offer this tax receipt in evidence.

Mr. Young: I object to it on the ground it is wholly immaterial and self-serving.

The Court: The tax receipt on what?

Mr. Boshae: On the money. That was introduced, and I think counsel brought that up, brought up these bank accounts, your Honor.

The Court: Very well. Overruled. Received in evidence as Defendant's Exhibit I.

The Clerk: Is this a part of Exhibit I? [239]

(Testimony of J. H. Grenier.)

Mr. Boshae: Yes, that is a part of it.

(The document referred to was marked Defendant's Exhibit I and was received in evidence.)

Q. (By Mr. Boshae): Did Mr. Harley ever tell you why he was giving you that deed, Mr. Grenier?

A. Because he was dissatisfied with the will, and he was going to see that I got this property. In fact, I loaned him a part of the money when he bought this property in 1936.

Mr. Boshae: You may cross examine.

Oh, may I ask one more question, Mr. Young?

Mr. Young: Yes.

Q. (By Mr. Boshae): Mr. Grenier, did you pay any gift tax on this property in Montana?

A. No, I didn't. I was told I had 18 months before the gift tax had to be paid, and, also, the Internal Revenue Collector in Helena, Montana, told me, being it was a gift, that the estate was subject to paying the gift tax.

Mr. Young: I move to strike that, your Honor, as hearsay.

The Court: The part "I was told" is stricken.

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): Now, Mr. Grenier, Mrs. Catherine Benifer was a sister [240] of Mrs. Tessie Harley; is that right? A. Yes.

Q. And Mrs. Tessie Harley was the wife of Dan L. Harley? A. Yes.

(Testimony of J. H. Grenier.)

Q. Is that correct? A. Yes.

Q. And Mrs. Agnes Kelley was also a sister?

A. Yes.

Q. Is that right? A. Yes.

Q. Now, when Mr. Harley told you that he was dissatisfied with his will, he referred to the will where he left some of his estate to Mrs. Benifer and Mrs. Kelley, didn't he?

A. No, that will—the will he was referring to was the will that was drawn up, so-called will he called it, Mr. Thompson's will. That was——

The Court: That was the April will?

The Witness: That was the April will.

The Court: Exhibit 16 here.

Mr. Young: April 7th.

Q. But isn't it a fact that Mr. Harley told you that he was going to change his will of March 22nd which mentioned Mrs. Benifer and Mrs. Kelley?

A. Yes.

Q. Going to change it because Mrs. Benifer had filed a contest on his wife's will?

A. That's right.

Q. And also Mrs. Benifer had filed a petition to have Dan Harley adjudged or adjudicated incompetent? A. Right.

Q. And that was the reason he was going to change the will?

A. That was that March will, yes.

Q. So he did change that and made a will on April 7th, didn't he?

(Testimony of J. H. Grenier.)

A. Yes. I stated the April will, but the date, I don't know anything about that.

Q. But the reason he wanted to change his March will was to cut out Mrs. Benifer and Mrs. Kelley as his beneficiaries?

A. As for Mrs. Kelley, I don't know anything about Mrs. Kelley being mentioned in that so-called March will, but I know Mrs. Benifer was.

Q. And that is where he said that that will stank,—that is what he referred to, as to Mrs. Benifer; isn't that right?

A. No, sir, it is not right.

Q. What part of the will of March 22nd did he tell you stunk or stank? [242]

The Court: Not the March 22nd.

Mr. Young: March 22nd, 1955.

The Witness: Not the March 22nd. The April is what I am talking about.

Mr. Young: April 7th. There is a will dated March 22nd, your Honor.

The Court: Yes, March 22nd, but the one he said stank is the April will, as I understand it, the will of April 7th.

The Witness: Yes, April 7th.

Q. (By Mr. Young): In what respect?

A. I don't know, because I don't know nothing about the will, I don't know what was in the will.

The Court: The March will is Plaintiff's Exhibit 3, and the April will is Plaintiff's Exhibit 16.

Q. (By Mr. Young): I call your attention to

(Testimony of J. H. Grenier.)

Plaintiff's Exhibit No. 16, which is a photostatic copy of the will dated April 7th.

The Court: May I say that Exhibit I, Mr. Clerk, is the last one introduced.

Q. (By Mr. Young): (Continuing) Calling your attention to the first paragraph that makes any disposition of his property:

"Fourth: I hereby give, devise and bequeath to the following persons the following sums of money [243] or other property:

"(1) To my sister-in-law, Edna T. Harley, of San Marino, California, the sum of Five Hundred Dollars."

Did you know his sister-in-law?

A. Yes, I did.

Q. Did he tell you that that was one of the provisions in the April 7th will that stank?

A. No, he didn't tell me anything about it at all. He just stated the will itself stank.

Mr. Boshae: Will you please speak a little louder, Mr. Grenier, so that I can hear you.

Q. (By Mr. Young): "(2) To my deceased wife's sister, Agnes Kelley, also known as Mrs. Pat Kelley, of Butte, Montana, the sum of Five Hundred Dollars."

Did he tell you about that provision?

A. No, he did not.

Q. Did he say that stank?

A. He didn't mention any provision in the will. He said the will stank as a whole. That was the conversation.

(Testimony of J. H. Grenier.)

Q. You know these two people?

A. Yes, I do, I know them very well.

Q. And they were relatives of his?

A. Mrs.—this Mrs. Harley is Jimmy's step-mother.

Q. Yes. [244]

A. And this (indicating) is his wife's sister.

Q. Jim Harley or Dan?

A. Mrs. Dan Harley's sister is the woman from Butte.

Q. Mrs. Kelley? A. Yes.

Q. And this woman here, Mrs. Doris Cornforth, mentioned in paragraph (3), who is she?

A. I have to think about that. I think she is a niece of Mrs. Harley.

Q. Of his wife?

A. Yes, but I am not sure about that. I don't know.

Q. "(5) To my old and esteemed friend, Joseph H. Grenier, of Deer Lodge, Montana, an undivided one-half interest in and to the three buildings and real estate owned by me and located in Deer Lodge, Montana."

That is you? A. Yes, sir.

Q. He didn't say that stank?

A. He mentioned—he mentioned that the whole will stank.

Q. "Fifth: I hereby give, devise and bequeath all of the rest, residue and remainder of my property and estate of whatsoever kind and character and wheresoever same may be situated, in which I

(Testimony of J. H. Grenier.)

may have any interest, [245] of which I may die seized or possessed, to my nephew, James W. Harley, Jr., of Long Beach, California.”

You knew Jim?

A. Sure, I have known him since he was a kid.

Q. Are any of those names that I read to you in that will that are not either relatives of Dan Harley or his wife, except yourself?

A. Well, the Mrs. Harley—Jimmy’s stepmother, it was his brother’s wife, Dan’s brother’s wife.

Mr. Young: That is all, your Honor.

Mr. Boshae: You may step down, Mr. Grenier.
(Witness excused.)

Mr. Boshae: The defendant rests, your Honor.

The Court: Any rebuttal?

Mr. Young: No rebuttal.

The Court: Both sides rest?

Mr. Young: We rest.

The Court: I think we will take the morning recess, and then I will hear your argument.

(A short recess.)

The Court: You may proceed.

Mr. Young: May it please the court. It would be supererogation on my part to undertake to discuss the evidence in this case. Your Honor, as the trier of fact, has heard the [246] evidence, and observed the witnesses on the witness stand.

This case, it seems to me, resolves itself around a question of fact, and a basic principle of law, and I think the basic principle of law is applicable under the evidence in this case.

I think we have a typical pattern of a fiduciary retaining a trust in his personal possession, and taking an unfair advantage of his trust with his principle, and getting an unjust gain to himself personally.

Now, there are three elements involved, as I understand it, applicable to fiduciaries in this case.

One, did the fiduciary sustain a confidential relationship? Under the evidence, there can be no doubt about that in this case. From the testimony of the defendant himself he held a power of attorney of the decedent up in Montana, he was his business adviser, and his business agent, he was on his bank accounts, and he had access to his safety deposit box where his securities were kept, and from his own testimony, I submit there can be no other finding, if your Honor please, than that Mr. Grenier, the defendant, certainly was a fiduciary during the time that these transactions which have come out in the evidence took place, the bank accounts, and the deed, specifically, of May 16th was signed by this decedent.

The second point, undisputed in this case, too, is that [247] Mr. Grenier, from his own testimony, actively participated, and he procured the deed itself. He went to a stationery store, and bought it, took it to a public stenographer of his own choosing, and had it filled out, and the decedent had nothing to do with the preparation of the deed. Not only was there activity on the part of the defendant to get the deed prepared, but he was the

only one who had anything to do with it, so far as the direction of its preparation was concerned.

Also, he went to the bank and brought the notary over to Mr. Harley's house at the time the deed was executed. He was there, and he obtained the execution of the deed through his own activity. That is the second point of law, your Honor, that I believe is involved in this case.

And, of course, he unduly profited by the transaction, because he paid nothing for it.

So that, your Honor, raises the presumption of undue influence, under the evidence in the case, and the burden shifts to the defendant to show by a preponderance of the evidence, or substantial evidence, that he did not obtain the deed under undue influence.

Now, that is the argument that I have to make in a nutshell. Your Honor, as the trier of fact, will determine as to where the weight of the evidence is, and as to the credibility of the evidence, and the law I believe is just as I [248] have stated it.

The Estate of Pellegrini, which is the latest case which I have found on the subject matter, 138 Cal. App. 2d 143, hearing denied by the Supreme Court on February 15, 1956, sets forth the statement that I have just concisely made to your Honor.

So I submit the plaintiff's case on the argument that I have just made, your Honor.

The Court: Does the record here show that any of these wills here have been admitted to probate? I don't know that that has been shown.

Mr. Young: No, your Honor, no will has been admitted to probate. The only will that was filed, where a petition was filed for probate, was the will of July 28th, and a contest was filed before probate, so that will was never probated.

The next will, which will be offered for probate, is the will of April 7, 1955. The petition is now in preparation to offer that will for probate.

Thank you, your Honor.

Mr. Boshae: If your Honor please, I am inclined to agree with counsel, and I have enough trust and confidence in the court, and in your Honor's observation of the witnesses, that I am not going to go into any of the testimony, because it is all before you. You have listened to it for [249] a day and a half. The only thing I can say, your Honor, is that I think we have borne the burden of proof.

You have heard the testimony of our witnesses, and, primarily, this was a situation where the plaintiff has contended that the decedent was incompetent, the grantor was incompetent, by reason of his physical condition, by his sickness, by mental incapacity, and I think that that has been overcome not only by our witnesses, your Honor, but by his. None of the testimony of any of the witnesses for the plaintiff show any incompetency, so far as mental condition is concerned.

The Court: You don't need to spend any time on that.

Mr. Boshae: Thank you, your Honor. Now, so far as Mr. Grenier is concerned, the only thing is this: Your Honor is familiar with the law that in

order to vitiate a transaction, particularly a will or a deed, that the influence that is asserted on the part of the grantee or the beneficiary must exist as to the act itself.

We have tried to put on evidence, and I think we have, that the deed was brought—and it is uncontradicted, that the deed was brought to Mr. Harley by Mr. Grenier, and it was left there for a week, and he told several people that he wanted to deed the property to Mr. Grenier, and, in fact, both Mr. Harley and Mr. Joe Edgar knew of the transaction.

The Court: Don't we start here with the situation where [250] the evidence shows the fact that the decedent reposed such trust and confidence in the defendant—

Mr. Boshae: There is no question, your Honor, about that.

The Court: —that there existed in fact, if not in law—laying aside the attorney in fact relationship—there existed in fact a fiduciary or confidential relationship between the decedent and the defendant here?

Mr. Boshae: There is no question, your Honor, about it.

The Court: Now, the defendant received the conveyance admittedly without consideration. So where does that place him?

Mr. Boshae: It places him, your Honor, in the position that he has to show that he got the property with the knowledge of the grantor.

The Court: He has to show an intent to make a gift of the property to him, doesn't he?

Mr. Boshae: That is correct.

The Court: A donative intent on the part of the grantor?

Mr. Boshae: That is correct.

The Court: Now, what about Mr. Edgar's testimony? He mentioned that he, Edgar, mentioned to the defendant this deed, in the presence of the decedent, and he said something to this effect, "You did that in an effort to avoid involving this property in a will contest, and involving the decedent's [251] wife," I take it?

Mr. Boshae: Your Honor, I don't recall that he said that in front of the deceased. But assuming he did——

The Court: He said it to the defendant, and the defendant, according to Edgar, said, "That's right."

Mr. Boshae: That, your Honor, is a question of fact, for the simple reason that subsequent—prior and subsequent to that time, an individual who was just as close as Mr. Edgar, if not closer, the doctor, discussed it with him many times, on a number of occasions, and the fact that the testator or deceased had donative intent is reflected in the wills. There is no question but what he wanted to give him something.

The Court: There is no doubt about that. Of course, in this type of case we are always up against the situation that people, when they get that old, get a little bit childish, and even if they are not childish, perhaps they are a lot smarter than we

give them credit for being, they know the frailties of human nature pretty well, and they know that the greatest attention they can get is through their property, and this man would not be the first one who kept everybody on the anxious seat as to what he was going to do with his property.

Most lawyers have some elderly clients who, if they have much of anything at all, and don't have people too close to them who are certain to get it all, who dangle in front of [252] near relatives, and distant relatives, and friends, the thought that, "I am going to leave you something,"—and as I was about to say in that remark, most lawyers have had the experience of such people, who will change their wills to a point of being nuisances. They will change their wills in little ways to the point of being nuisances to the lawyers.

Now, it may be this man was that type, or he may have had a keen sense of humor about these people who were around him, like the nurse who wanted something. It may be that. So far as knowing what he intended, who can say but what this will that he on July 28th was what he actually intended? But that will has been found and adjudicated conclusively to have been invalid.

I am referring to his subjective intent now. All we can judge him by is the objective manifestation.

Mr. Boshae: That is the only thing I can argue by, your Honor. I don't know the man's mind internally. The only thing I can say is that he was before a court in April, 1955, and they declared him

to be competent to transact his business and his personal affairs.

The Court: Yet Judge Schweitzer found that at some time—well, he found that back for some time prior to the end of July, July 28th, that the man was not.

Mr. Boshae: That, your Honor, the ruling of Judge Schweitzer could only refer back to the execution of that [253] will. I don't think there is anything in the decree that says that he was incompetent at any specific time prior to July 28th.

The Court: These findings are binding upon your client, aren't they, in this proceeding?

Mr. Boshae: Certainly, they are.

The Court: Very well.

Mr. Boshae: And I think that the findings of the court and the guardianship proceedings are binding upon the plaintiff, and it would be more likely—

The Court: Yes, I suppose they are.

Mr. Boshae: And it would be more likely that the deceased would be in a frame of mind that he knew what he was doing on May the 16th, when the order was made declaring him a competent person in April, one month prior thereto, than it would be that he was incompetent when this order was made with reference to an act almost two and one-half months later.

The Court: I will find that he was competent, and that he was competent at the time that this deed was signed.

Now, we have this situation that I would like for you to address your remarks to. Apparently, Mr.

Edgar, who does not have any interest at all in the matter, as it appears, comes in and he swears on that stand three things:

One, he says that the defendant said to the decedent that he didn't want any of his property, wouldn't have any [254] of his property; two, that when the bank accounts were opened in joint tenancy, that the defendant repudiated any intention whatever to do anything but to turn the balances remaining after the death of the decedent over to the decedent's estate; and, three, the matter I have just adverted to, namely, that when the deed was brought up, the defendant agreed that the purpose of the conveyance of the Deer Lodge property to him, the defendant, was in an effort to keep it from being involved in the will contest over the wife's estate.

Mr. Boshae: May I answer those points, your Honor?

The Court: Yes, I would like to hear you on them.

Mr. Boshae: In connection with the first, your Honor, where Mr. Edgar says that the defendant did not want the property,—I think that was your first point. In the first place, that was denied by my client.

The Court: Yes. Now, let's just take that right now. We have to find the truth somewhere here from highly conflicting statements.

Mr. Boshae: I have some more remarks in connection with that, but that was the first point.

The Court: Yes. Now, there is an interest, and your client has a monetary interest to deny it. What

interest would Mr. Edgar have, to come in here and swear that it happened if it didn't happen?

Mr. Boshae: Your Honor, here we are running into a [255] situation where we have an admission, the testimony of an admission, and I think it is well established that admissions are to be taken with caution. That is the only evidence we have by Mr. Edgar which will have any bearing or any reflection that that was not intended as a gift.

In the first place, that was made by a third party, not by the grantor.

In the second place, Mr. Edgar was supposedly a legal adviser to the grantor.

Now, your Honor, you take that testimony, with the fact that he was supposed to supervise the estate of the deceased, and he knew one month later, that is, June 16th, he was told that that property was deeded to Mr. Grenier, and nothing was done about it.

The Court: What could be done about it? What would you have done about it, if you had been his attorney?

Mr. Boshae: I would have advised him, if I didn't think he did it legally, to bring an action to set it aside. And if the testator would have had confidence in me, as his legal adviser, he would have gone along with it.

But everybody knew, your Honor, that Mr. Grenier was a lifelong friend, that they had helped each other, that he wanted him to get the property, and that is why nothing was done about it.

The Court: There is no question that he wanted him to [256] have something.

Mr. Boshae: He wanted him to have that whole property, your Honor.

The Court: Then why would Mr. Grenier,—if that were true, why would Mr. Grenier adopt Mr. Edgar's suggestion that this conveyance was for the purpose of avoiding involving this real estate in the will contest?

Mr. Boshae: That was Edgar's testimony. That wasn't my client's testimony.

The Court: In other words, you are suggesting that I find that Edgar's testimony is not true?

Mr. Boshae: Even if you find it is true, your Honor,—even if you find it is true, that conversation took place prior to the execution of that deed.

The Court: About the Deer Lodge property?

Mr. Boshae: Yes, sir.

The Court: The conversation that he didn't want anything under the will took place prior to the deed?

Mr. Boshae: And, as I recall it, also the conversation where he said that he would take it to avoid it being involved in the Benifer estate, or whatever the relative's estate was.

The Court: That isn't my recollection. As I recall, it was after the deed was made.

Mr. Boshae: No, I recall it was before the deed was made, [257] that it was at some time when they were discussing, and if your Honor will look back in the record, it was along about that time, prior to the execution of the deed, that that conversation took place. I would like your Honor to refresh

your thoughts on it, if it is necessary to refer to the record.

The Court: Can you find Mr. Edgar's testimony, that portion of it?

The Reporter: I can find it, your Honor.

The Court: Will you refer to it, and read it, please?

(The portion of the testimony of Joseph H. Edgar referred to was read as follows:

"Q. All right. Now, where did you see Mr. Grenier on July 16, 1955?

"A. At 1330 Blossom Street.

"Q. And who all was there? Who else was present?

"A. Mr. Daniel Harley was there, Mr. Grenier was there, and I was there.

"Q. Did you have a conversation at that time with Mr. Grenier—— "A. I did.

"Q. ——with reference to the Deer Lodge, Montana property? "A. I did, sir.

"Q. All right. State that conversation. [258]

"The Court: Was it in the presence of Dan L. Harley?

"Mr. Young: Yes, Dan L. Harley. I understood he was there.

"The Court: Is that correct?

"The Witness: Yes, sir. Do you want the whole conversation that took place that day?

"Q. (By Mr. Young): Yes, state the conversation.

"A. Well, Mr. Grenier said that he understood—he told me, he said, 'I understand that Jimmy

Harley has been out to see Dan, and that he has talked to Dan about having a guardian appointed for him.'

"He said, 'Dan doesn't need a guardian.' He said he has—he said, 'If he does have one, it isn't going to be Jimmy Harley.' He said, 'I am perfectly capable of taking care of Dan's affairs.' He said, 'I have a power of attorney from Dan.' He said, 'I am paying the bills.' He said, 'I have—the accounts are in joint tenancy.' He said, 'I am taking care of all of the bills.'

"Q. What accounts did he refer to?

"A. The bank accounts.

"Q. Very well.

"A. I said to him—I don't know whether this was in sequence, but, anyhow, Dan was lying on the [259] couch, and had been confined either to the couch or bed for some time, and so I said to him, 'What is going to happen to those bank accounts when Dan dies? They are in joint tenancy, and,' I said, "under the law they will go to you.'

"He said, 'Just as soon as an executor is appointed for Dan's estate,' he said, 'I am going to turn those accounts over to him.'

"The Court: Who said that?

"The Witness: Mr. Joe Grenier.

"So to go back to the conversation, when the discussion about Jim Harley being appointed his guardian took place, he said, 'Jim Harley has always'—he says, 'is hardly more than a stranger to Dan, and he isn't going to be his guardian.' He said, 'Isn't that right, Dan?'

"And Dan said, answered the question, 'Yes.'

"Then I said to Mr. Grenier, I said, 'I understand that Dan has also deeded the Montana property to you.'

"He said, 'That's right.'

"I said, 'What is back of that? Does he intend to avoid the Tessie Harley will contest by doing that?'

"He said, 'That is right.' [260]

"Q. (By Mr. Young): That is what Mr. Grenier said? "A. Yes, sir.

"The Court: Did all this occur in the presence of Dan Harley?

"The Witness: It did, your Honor.

"The Court: Within his hearing?

"The Witness: Yes, your Honor.")

Mr. Boshae: All right. Your Honor, let's assume that is a fact. He didn't say Mr. Grenier was going to hold it to avoid the Harley will contest. Assuming that he was giving it to him, and that that conversation took place in July, it did not vitiate a deed that had been given prior thereto to Mr. Grenier, with the intention of conveying that property to him. There is nothing in that comment to show that Mr. Grenier was holding that property in trust for anybody.

May I have that comment again, please, Miss Reporter? Will you read that again?

(The portion of the record referred to was reread.)

Mr. Boshae: Will you mark that portion, please.

Now, if the court please, regardless of what the purpose of conveying this property was, if there was

an intention to convey that deed to Mr. Grenier, whether to avoid litigation, or anything else,—

The Court: Oh, if there was an intention to make a gift, there is no question about it.

Mr. Boshae: This was two months later.

The Court: But doesn't this negative an intention to make a gift?

Mr. Boshae: Not necessarily; not necessarily. This was a gift that was made two months prior, your Honor.

Now, from what I understand your Honor's observation to be, you are disregarding all the evidence of everyone else, and pinning your thoughts on Mr. Edgar's statement.

The Court: Well, your client didn't deny it.

Mr. Boshae: Yes, he did.

The Court: He denied all of this?

Mr. Boshae: Yes, sir. I asked him specifically on his examination, your Honor.

The Court: I didn't recall that you had asked him about it.

Mr. Boshae: Yes, I did, your Honor.

The Court: About the conversation with Edgar? I didn't recall it.

Mr. Boshae: I definitely recall it. If your Honor wants the reporter to refer to it—

The Court: No, I don't. Even assuming that, on what basis can I find that Edgar perjured himself?

Mr. Boshae: I am not saying he perjured himself. [262]

The Court: There is no room for mistake in this testimony.

Mr. Boshae: Then are we going to say that all the other people perjured themselves?

The Court: No. They didn't testify to the contrary of this. You can't say Edgar testified to that by mistake, can you?

Mr. Boshae: No, of course not.

The Court: All right. Then if you want to put it that way, it is a question of: Shall I believe your client, the defendant, or shall I believe Edgar?

Mr. Boshae: No, your Honor. Or are you going to believe the doctor, when he said, "I want to give this property to Mr. Grenier," and also the testimony of Mr. Jenkins, who said——

The Court: You proceed with your argument.

Mr. Boshae: Well, your Honor, if the court has made up its mind——

The Court: I have.

Mr. Boshae: Then, of course, there is no need of arguing.

The Court: I will be glad to listen to it, but I have listened to all of these witnesses, and I try to take into account human nature.

I don't find that this defendant defrauded the decedent, [263] but he stood in that peculiar relationship where, unless he can show the contrary, the law presumes, doesn't it?

Mr. Boshae: I submit, your Honor, we have overcome the presumption. If your Honor does not agree with me, that is something that I have no control of.

The Court: It is a question of constructive fraud. It is not actual fraud, it is a question of constructive fraud, the effect of it.

I find that the decedent was competent, that he had good eyesight, he knew what he was doing. I find that he gave this property in trust, through a constructive trust to the defendant, to hold for the purpose for which both the decedent and the defendant—the decedent by his silence and the defendant by his positive assertion declared to be the purpose of the trust: not a gift, but to hold it to avoid involving it in some litigation. He became constructive trustee of it, so he is obligated to reconvey it to the estate, and he is obligated to account to the estate for the rentals, less the necessary expenditures, which are represented by Defendant's Exhibit G.

In reaching this conclusion, I am doing it in the light of all the testimony, and in the light of the documentary evidence, namely, the successive documents, which the decedent also signed with as great a solemnity as the deed,—what is contained in those.

Mr. Boshae: May I ask the court to have a stay of execution for a definite period of time, to consult with my client on this matter?

The Court: Findings of fact and conclusions of law and judgment will be ordered in favor of the plaintiff and against the defendant, and will be prepared by the plaintiff, and lodged with the clerk within ten days, pursuant to Local Rule 7.

Now, as soon as the judgment is entered, if there

is any occasion to delay, I will be glad to hear you then.

Mr. Boshae: All right, your Honor.

The Court: But it will probably be at least two weeks. Is notice of the pendency of this action recorded up in Montana?

Mr. Young: Mr. Boshae told me it was. Did you file a *lis pendens*? I think you told me you had filed a notice.

Mr. Boshae: No, I didn't tell you there was a notice filed.

Mr. Young: I thought there was. I thought we had done it, your Honor.

The Court: Well, the defendant is restrained from making any disposition, or any encumbrance, or doing anything to affect the title of this property until further order of court.

Mr. Young: Thank you, your Honor. [265]

The Court: You understand the order, Mr. Grenier?

Mr. Grenier: I didn't get that, your Honor.

The Court: You are restrained from making any conveyance, or encumbering the property, or doing anything adversely to affect the title to the property.

Mr. Grenier: Yes. I can still collect rents?

The Court: Until further order of court. You are in effect trustee, as you have been all along, of the property.

I want to make it clear that I do not find any actual fraud. These men were fast friends, and it may well be that if Dan Harley were here to say

anything, he might well say, "Certainly, I will give it all to Joe Grenier." But I find that was not his intention while he was alive. If he had lived until this time, rather than see this litigation, he might have said so. But it is clear to me from the evidence that during Dan Harley's lifetime Joe Grenier himself considered that he held this property in trust, and he will be charged as a constructive trustee by reason of the presumption which arises from his fiduciary relationship, which the court finds has not been overcome by any of the evidence.

Is there anything further, gentlemen?

Mr. Boshae: Nothing further.

Mr. Young: Thank you, your Honor.

CERTIFICATE

I, Marie G. Zellner, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcript of my stenographic notes.

Dated at Los Angeles, California, this 17th day of January, 1957.

MARIE G. ZELLNER,
Official Reporter.

[Endorsed]: Filed Feb. 21, 1957. [266]

[Endorsed]: No. 15459. United States Court of Appeals for the Ninth Circuit. Joe Grenier, Appellant, vs. James W. Harley, Special Administrator with General Powers of the Estate of Dan L. Harley, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 25, 1957.

Docketed: March 4, 1957.

PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15459

JOE GRENIER, Appellant,

vs.

JAMES W. HARLEY, etc. Appellee.

APPELLANT'S STATEMENT OF POINTS

Comes Now the Appellant and submits herewith his Statement of Points:

I.

That the following Findings of Fact are not supported by the evidence:

The indicated portion of Finding No. 2.

“That defendant obtained the execution of said deed by the decedent through undue influence and constructive fraud practiced by defendant on the decedent.”

Finding No. 3. “That it was not the intention of the decedent in executing and delivering said deed to the defendant to make a gift of the real property described in said deed to defendant. That it was the intention of the decedent in executing and delivering said deed to the defendant to vest the title to the real property described in said deed in the defendant only as trustee for the decedent.”

Finding No. 6. “That the defendant holds the title to the real property described in said deed and described in paragraph I of Plaintiff’s Amendment to Plaintiff’s Amended Complaint as trustee for the Estate of Dan L. Harley, deceased.”

Finding No. 7. “That the allegations contained in paragraphs I and II of the Cross-complaint of the defendant are untrue; that the denials and allegations contained in paragraphs I and II of Plaintiff’s Answer to the Cross-complaint of defendant are true.”

II.

The following Conclusions of Law are not supported by the evidence and are contrary to law:

Conclusion No. 4. (The indicated portions thereof): “That plaintiff is entitled to judgment against defendant in the sum of \$4,230.00 representing the total rents collected by the defendant from the real property described in paragraph I of the Plaintiff’s Amendment to Plaintiff’s Amended Complaint since

June 1, 1955, to and including November 1, 1956. That defendant is entitled to a credit on said amount of \$4,230.00 in the sum of \$1,498.93 representing expenditures made by defendant for the necessary repairs and maintenance on said real property * * * leaving a balance due from defendant to plaintiff in the sum of \$2,731.07, together with interest in the amount of \$200.00, thereby making a total sum of \$2,931.07, which sum of money the defendant holds as trustee for the plaintiff."

The indicated portions of conclusion No. 6.

That plaintiff is entitled to judgment against defendant. Directing and ordering the defendant to execute the grant deed which has been lodged with the Clerk of the Court and which conveys said real property described in paragraph I of plaintiff's Amendment to Plaintiff's Amended Complaint to the Estate of Dan L. Harley, deceased; * * *"

Conclusion No. 9. "That plaintiff is entitled to judgment that defendant shall take nothing from plaintiff by reason of defendant's Cross-complaint on file herein."

Respectfully submitted,

/s/ GEORGE BOSHAЕ,

Attorney for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 4, 1957. Paul P. O'Brien, Clerk.